Non-charitable Purpose Trusts

Manitoba
Law Reform
Commission

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Law Reform Commission

Commission de réforme du droit

NON-CHARITABLE PURPOSE TRUSTS

September 1992

Report #77

93-02268/

Canadian Cataloguing in Publication Data

Manitoba. Law Reform Commission.

Non-charitable purpose trusts.

(Report ; #77)

Includes bibliographical references.
ISBN 0-7711-0889-3

1. Trusts and trustees -- Manitoba. 2. Manitoba. Trustee Act. 3. Charitable uses, trusts and foundations -- Manitoba. I. Title. II. Series: Report (Manitoba. Law Reform Commission) ; 77

KEM240.A72 L38 1992 346.712705'9 C92-092704-1

Some of the Commission's earlier Reports are no longer in print. Those that are still in print may be ordered from the Publications Branch, Office of the Queen's Printer, 200 Vaughan Street, Winnipeg, Manitoba R3C 1T5.

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The Manitoba Law Reform Commission is an agency of and is primarily funded by the Government of Manitoba.

Additional funding is received from The Manitoba Law Foundation.

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CHAPTER 1

INTRODUCTION

A. THE PROBLEM

Most people would agree that both of the following trusts are for worthy causes:

I direct that the residue of my estate be held in trust to be used to promote literacy in Canada.

I direct that the residue of my estate be held in trust to finance research into environmentally friendly products.

Even though both trusts would make useful contributions to Canadian society, the law will treat them in very different ways. The law will accept the first trust (supporting literacy) as valid and give it effect. However, the second trust (supporting environmentally friendly products) will probably be found by the courts to be invalid; rather than being used to develop environmentally friendly products, the assets of the trust will be returned to the trust's creator or his or her estate.

Why are the wishes of the creator of the trust honoured in one case, but are overturned in the other? The reason is that the law classifies the first trust as being charitable in nature, while the second trust is classified as non-charitable. The law favours charitable trusts and has developed several mechanisms over the years to ensure their validity. No such mechanisms have been developed for non-charitable purpose trusts; as a result, they are usually struck down by the courts.[1] This Report considers whether it is just that trusts which are classified as non-charitable are usually found to be invalid and whether the law relating to such trusts should be reformed.

B. ORGANIZATION OF THE REPORT

The early part of our Report sets out necessary background information. In particular, Chapter 2 gives a brief overview of the law of trusts, focusing on the requirements for a valid trust and the distinction between trusts for the benefit of persons and trusts for the benefit of purposes. We note the methods which the law has developed to assist charitable purpose trusts to meet the requirements of a valid trust and the failure of the law to develop similar methods to benefit non-charitable purpose trusts. After considering the potentially valuable use of non-charitable purpose trusts in present-day society, we conclude that the law should be reformed: the obstacles to the validity of non-charitable purpose trusts should be removed.

Chapters 3 and 4 deal with the two major problems that can invalidate a non-charitable purpose trust: the absence of a person to enforce the trust and the absence of a mechanism to correct any uncertainty in the method by which the trust is to be carried out. Each Chapter recommends solutions to these problems. Chapter 5 deals with the subsidiary issue of trusts

[1] For example, Canadian courts have struck down trusts to finance a community project and to establish an annual award for "a lyric, beautiful in content and form": *Re Jacques* (1967), 63 D.L.R. (2d) 673 (B.C.S.C.); *Re Millen Estate* (1986), 22 E.T.R. 107 (B.C.S.C.).

which have more than one purpose (charitable or non-charitable). Chapter 6 sets out amendments to *The Trustee Act* which would give effect to the recommendations contained in this Report, together with explanatory annotations. Finally, Chapter 7 gathers together and restates our recommendations. Appendix A contains our suggested amendments to *The Trustee Act*, without annotations.

An Executive Summary of this Report appears on page 59.

C. ACKNOWLEDGEMENTS

This Report, one of a series in the Commission's project on the law of trusts, was made possible by a grant from the Manitoba Law Foundation. The Foundation has, as part of its mandate, the promotion of law reform and has, through its grants to the Manitoba Law Reform Commission, made a significant contribution to the improvement of the laws of Manitoba. The Manitoba Law Reform Commission has been a recipient of grants from the Foundation since its inception in 1986 and we gratefully acknowledge their important support of this and other projects.

The Commission would also like to thank Dr. Donovan Waters of the Faculty of Law, University of Victoria, for his invaluable advice and assistance throughout this project.

CHAPTER 2

THE LAW

A trust is a relationship in which one person, the trustee, holds and administers property for the benefit or support of the trust object. A trust created for implementation during the lifetime of its creator (known as the settlor) is called an *inter vivos* trust. A trust created by a will which becomes effective upon the death of its maker (known as the testator) is called a testamentary trust.[1] Trusts can be broadly categorized according to their objects, which are either persons or purposes. The purposes can be either charitable or non-charitable in nature.

Trusts for non-charitable purposes are generally found by the courts to be invalid.[2] They lack many of the privileges provided to trusts which fall into the other categories. This Chapter will provide an overview of these categories in an effort to explain the general invalidity of non-charitable purpose trusts.

A. TYPES OF TRUSTS

1. Person Trusts

A person trust (also known as a private trust) is a relationship in which the trustee holds and administers property for the benefit of another person, the beneficiary. The trustee is the legal owner of the property but the beneficiary is the beneficial or equitable owner of the property. Trusts for people have three parties: a creator (either a settlor or a testator), a trustee and a beneficiary.

2. Purpose Trusts

A purpose trust (sometimes called an object trust) is also a relationship in which a trustee holds and administers property and it can be created by a settlor or a testator. However, purpose trusts have only two parties, a creator and a trustee, and do not have a beneficiary. Instead, they are created to further a stated objective or purpose, such as the building of an orphanage[3] or the promotion of fox hunting.[4] The purpose trust may be charitable or non-charitable in nature.

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[1]Trusts created by circumstance, such as resulting and constructive trusts, will not be considered in this Report.

[2]Where a trust fails and there are no directions as to where the assets are to be applied, the funds revert back to the creator of the trust or his or her estate.

[3]*Re Forgan Estate* (1961), 29 D.L.R. (2d) 585 (Alta. S.C.).

[4]*In re Thompson*, [1934] Ch. 342.

(a) Charitable trusts

A charitable trust is one whose purpose falls within the legal definition of charity. However, the legal definition of charity and society's perception of what is charitable are not always the same. The public tends to view any purpose which is benevolent or is simply non-profit as charitable.[5] The law, on the other hand, discerns charitable purposes by applying specific legal tests developed over the centuries.

The legal definition of charity maintains that a purpose trust is charitable if three requirements are met. First, the purpose must fall within one of the four heads of charity set out by Lord Macnaghten in the 1891 *Pemsel*[6] case. These heads of charity are: the relief of poverty, the advancement of education, the advancement of religion, and miscellaneous activities beneficial to the community. Secondly, a public benefit must exist; that is, a sufficient portion of the public must benefit or potentially benefit from the trust. There is no public benefit where those who are aided are either small in number or are defined by their relationship to the creator (except in the case of the relief of poverty of a class of people who are the relatives or the employees of the settlor or testator). Finally, the purpose must be wholly and exclusively charitable; that is, it must not embrace any non-charitable purpose in addition to the charitable purpose.

In determining the existence of a charitable purpose, the courts consistently review the historic foundation for the modern law of charity, found in the preamble of the *Charitable Uses Act, 1601*, sometimes called the *Statute of Elizabeth*.[7] This 1601 English statute contained the following list of charitable causes:

> . . . relief of aged, impotent and poor people, some for maintenance of sick and maimed soldiers and mariners, schools of learning, free schools, and scholars in universities, some for repair of bridges, ports, havens, causeways, churches, sea-banks and highways, some for education and preferment of orphans, some for or towards relief, stock or maintenance for houses of correction, some for marriages of poor maids, some for supportation, aid and help of young tradesmen, handicraftsmen, and persons decayed, and other for relief or redemption of prisoners or captives, and for aid or ease of any poor inhabitants concerning payments of fifteens, setting out of soldiers and other taxes.[8]

The courts continue to consider whether a charitable purpose falls within the intent, though not the letter, of this list.

The preamble illustrates that the concept of charity is constantly evolving. Few people today would believe that there is a charitable need to provide "for the marriages of poor maids". On the other hand, there are many purposes which are now considered charitable which were not included in the preamble. Although the courts have gradually recognized new charitable purposes as being within the spirit of the 1601 list, the legal concept of charity has not kept pace with the popular concept of charity. Consequently, many purposes which the average person would regard as charitable are in fact viewed by the law as non-charitable.

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[5]Thus, for example, a fund for taking action against pornography, which many would regard as a benevolent purpose, was not considered a charitable purpose: *Positive Action Against Pornography* v. *M.N.R.* (1988), 49 D.L.R. (4th) 74 (F.C.A.).

[6]*Income Tax Commrs.* v. *Pemsel*, [1891] A.C. 531 (H.L.).

[7]*Charitable Uses Act, 1601* (Eng.), 43 Eliz. 1, c. 4. For an example of the acceptance of the preamble as part of the law of Manitoba, see *In re Oldfield Estate (No.2)* (1949), 57 Man. R. 193 (K.B.).

[8]*Charitable Uses Act, 1601* (Eng.), 43 Eliz. 1, c. 4, preamble.

(b) Non-charitable purpose trusts

A non-charitable purpose trust has a purpose which falls outside the legal definition of charity. Many non-charitable purpose trusts do benefit people, such as a trust to further the purposes of an association or club or a trust to provide housing for native children being schooled off their reserve.[9] If the trust has no or little direct benefit to people, then it is an "abstract" non-charitable purpose trust. Trusts for erecting and maintaining monuments,[10] maintaining grave sites,[11] maintaining animals,[12] or creating a new alphabet for the English language[13] are examples of abstract non-charitable purpose trusts.

When the benefit to people is very direct, confusion can arise as to whether the trust is actually a purpose trust at all. The argument can be made that the people who benefit are truly beneficiaries, that is, individuals with a beneficial or equitable ownership in the property. Any expression of purposes is explained away as being merely a communication of the creator's wishes of the desired use of the trust property, but not a binding instruction of the trust. Classifying a trust as being either for people or for purposes has been crucial for, as we shall see, often the survival or failure of the trust rests on its classification. For a number of structural reasons which we will shortly examine, most trusts classified as being for a non-charitable purpose fail.

B. THE NECESSARY REQUIREMENTS FOR VALIDITY

There are three requirements for a trust to be valid.[14] First, a trust must be enforceable. Enforcement is the ability to force a trustee to deal with the trust assets properly. Positive enforcement is the power to compel the trustee to carry out the trust instructions; negative enforcement is the power to restrain the trustee from improperly using the trust funds. Secondly, a trust must be certain. Certainty will exist if a trust is clear in its instructions; a trustee or a court must be able to determine what is to be done in order to fulfil the intentions of the creator.[15] Thirdly, a trust must not be an excessive delegation of testamentary power. This rule, which only applies to testamentary trusts, asserts that only the testator has the power to dispose of his or her property and that the testator must not give to the trustee the power to select who will receive the benefits of the estate.[16]

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[9]*Keewatin Tribal Council Inc.* v. *Thompson* (1989), 61 Man. R. (2d) 241 (Q.B.).

[10]*Pirbright* v. *Salwey*, [1896] W.N. 86(4) (Ch.); *In re Hooper*, [1932] 1 Ch. 38.

[11]*In re Hooper*, *supra* n. 10.

[12]*Mitford* v. *Reynolds* (1848), 16 Sim. 105, 60 E.R. 812 (Ch.); *In re Dean* (1889), 41 Ch. 552; *Pettingall* v. *Pettingall* (1842), 11 L.J. Ch. 176.

[13]*In re Shaw*, [1957] 1 W.L.R. 729 (Ch.).

[14]Up until 1983, a trust was also required to adhere to the rule against perpetuities. The relevant perpetuities rule states that a trust is valid if it vests within a reasonable amount of time, which in the common law is twenty-one years after a stated life in being. In other words, the trust could not operate indefinitely without the contingent interests in the trust coming into existence within a specific time described by law. The perpetuities rule was abolished in this province in 1983 by the *The Perpetuities and Accumulations Act*, S.M. 1982-83-84, c.43, C.C.S.M. c. P33, following a recommendation from the Manitoba Law Reform Commission (Report #49, 1982). The rule continues to exist in one form or another in all other Commonwealth jurisdictions.

[15]The doctrine of certainty includes certainty of intention (the creator intended to create a trust as opposed to some other kind of gifting instrument), certainty of subject matter (the assets of the trust are identifiable) and certainty of object. For the purpose of this Report only certainty as it pertains to the object of the trust will be considered.

[16]*Brewer* v. *McCauley*, [1954] S.C.R. 645. The doctrine of excessive delegation of testamentary powers has not arisen in the context of a non-charitable purpose trust, though there is no reason to think that the doctrine would not apply. However, there would appear to be no pressing need to reform this doctrine and, thus, it will not be examined further in this Report.

As we shall see in the following discussion, these requirements for validity, while well-suited for person trusts, have posed problems for purpose trusts. Because of the social utility of charitable purpose trusts, the courts have developed methods of overcoming these obstacles to validity. However, the courts have been much less willing to do the same for non-charitable purpose trusts.

1. Person Trusts

The most common trust is the person trust. It is a trust in which there is a legal person, that is, a physical person or a corporation, who can be said to be the beneficiary of the trust. Trusts for workers' pension plans and the upbringing and education of children are two examples.

(a) Enforcement

In order to satisfy the requirement of enforceability, it is sufficient for a court to find the existence of a legal person who is a beneficiary of the trust. Accordingly, the requirement of enforceability poses no problem to the validity of a person trust, since it necessarily has a person as beneficiary. The law assumes that, because a beneficiary has a legal interest in the trust and thus is motivated by self-interest, he or she will monitor the actions of the trustee and ensure that the terms of the trust are carried out. "The 'beneficiary' can safely be relied upon to enforce the trust because he stands to benefit."[17]

It should be borne in mind, however, that, realistically, effective enforcement is dependent upon the availability of resources. Though beneficiaries may be expected to be motivated by self-interest, they may also lack the time, money or ability to monitor the activities of the trustee in an effective manner or at all.

(b) Certainty

A person trust is considered to be certain if the trustee is able to understand who is to benefit. Obviously, a trust will be certain if the beneficiaries are specifically named. However, sometimes beneficiaries will be named by class, such as, "a trust for my cousins on my mother's side". Certainty will exist if sufficient information has been provided to describe the benefiting group adequately.

The class description must be of such a nature that the trustee can properly judge who "is or is not" a member of the class. In addition, if the trustee must distribute part of the trust fund to each member of the class, then it is imperative that the trustee be able to make a complete list of the class membership. Only then is certainty achieved, for otherwise the trustee can never be assured that a missed member will not be found at some later date.

If, on the other hand, the trustee has the power to distribute the funds as he or she sees fit to the members of a class of beneficiaries, then the trustee need only be able to determine whether a person "is or is not" a member of the benefiting class.[18] Formulating a complete list of the class membership is unnecessary because the trustee has a discretion as to the distribution of the funds and has no obligation to give a portion to each and every member of the class of beneficiaries.

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[17] P.A. Lovell, "Non-charitable Purpose Trusts - Further Reflections" (1970), 34 Conv. 77 at 88.

[18] *McPhail* v. *Doulton (sub nom. Re Baden's Deed Trusts)*, [1971] A.C. 424 (H.L.) as applied in *Re Baden's Deed Trusts (No. 2)*, [1973] Ch. 9 (C.A.); *Jones* v. *T. Eaton Co. Ltd. (sub nom. Re Bethel)*, [1973] S.C.R. 635.

2. Charitable Trusts

If a purpose trust can be classified as being charitable, it will rarely be found to be invalid. Because of their benefit to the public, the law has developed a range of techniques to validate charitable trusts if they do not comply with the normal elements required for validity.

(a) Enforcement

Charitable purpose trusts do not have beneficiaries and thus would appear to lack a method of enforcement. However, the courts have placed the Crown in the role of enforcer of such trusts on behalf of the public.[19] "It is the duty of the King, as *parens patriae* [parent of the nation], to protect property devoted to charitable uses. . . ."[20] The Crown safeguards the public interest generally and therefore it is appropriate that it enforce charitable trusts which are, by definition, for the public benefit.

As with person trusts, effective enforcement is dependent upon adequate resources and active monitoring. However, of all the common law provinces, only Ontario has developed a system for monitoring charitable trusts.[21] Generally, the Crown elsewhere acts only in response to suspicions brought to its attention.[22]

(b) Certainty

For a charitable trust to be certain, it must adequately describe both the purpose which is to be furthered and the method of carrying out the purpose. However, even where a lack of certainty occurs, two remedies are available to save a charitable trust from failure. The remedies are called scheme-making and *cy-près*.

(i) scheme-making

A charitable trust will not fail even if there is uncertainty as to the method to be employed in carrying out the purpose. "Where the overriding intention of the donor is charitable but no mode for carrying it into effect has been prescribed, the law provides a mode."[23] An uncertain mode arises in a number of circumstances, the five most common of which are as follows:

a) the mode is inadequately described due to the total absence of detail (for example, "the residue of my estate for charitable purposes");

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[19] *Morice* v. *Bishop of Durham* (1805), 10 Ves. Jun. 522, 32 E.R. 947 (Ch.).

[20] *A.G.* v. *Brown* (1815), 1 Swans. 265 at 290, 36 E.R. 384 (Ch.) quoted in *Re Astor's Settlement Trusts*, [1952] Ch. 534 at 541.

[21] Ontario has specific legislation imposing upon the Public Trustee a supervisory role over charitable trusts; *Charities Accounting Act*, R.S.O. 1990, c. C.10.

[22] On the other hand, there is some regulation of the manner in which funds may be raised; no one may solicit for a charitable purpose unless the solicitation is authorized, in the City of Winnipeg, by the Civic Charities Endorsement Bureau, in any other municipality, by the mayor, reeve or other person or body appointed for the purpose by the local council, and, in all other cases, by the Minister charged with the administration of the Act: *The Civic Charities Endorsement Act*, C.C.S.M c. C60. It is interesting to note that the definition of "charitable purpose" is broader than that used by the common law and includes, for example, benevolent or artistic purposes and "the promotion of a civic improvement or the provision of a public service": *The Civic Charities Endorsement Act*, C.C.S.M c. C60, s. 1(1).

[23] S. Maurice and D. Parker, *Tudor on Charities* (7th ed., 1984) 218.

b) the mode is inadequately described due to the absence of some detail (for example, "the residue of my estate for improving the health of the poor in Winnipeg". A decision would have to be made as to the specific steps to be taken to fulfil the purpose whether that would be to build more clinics, establish a dental programme for the poor, or support an AIDS awareness campaign).

In the above two scenarios the court will attempt to approve of methods that the testator would have found acceptable.

c) an error has been made in describing an organization that is to benefit or the organization has changed its name (for example, "the residue of my estate for the Royal Manitoba Ballet Company", where in all probability the testator meant The Royal Winnipeg Ballet Company);

d) a described organization has merged with another (for example, a trust to support Child and Family Services of Central Winnipeg which has merged with Winnipeg South Child and Family Services (and other agencies) to become Child and Family Services of Winnipeg but which still serves residents in the area previously served by Child and Family Services of Central Winnipeg).

In the above two scenarios the court attempts to discover or trace the intended benefiting charitable organization and applies the trust to the organization if it can be found.

e) the trust machinery is inadequately described or is lacking specific detail (for example, the creator has failed to name the trustee).

The trust will not fail for lack of a trustee, for the court will appoint one.

(ii) *cy-près*

Closely associated with the issue of certainty are situations in which the method of carrying out the purpose is adequately described but is impracticable or impossible to fulfil. Some of the most common examples are as follows:

a) the trust fund is insufficient to achieve the purpose (for example, "$50,000 to be used to build a hospital in St. Norbert");

b) the described mode is unworkable or not practical in the circumstances (for example, a trust to establish a Buddhist Temple in Lynn Lake when there are no Buddhists in the area and there are unlikely to be enough in the future to warrant a temple);

c) at the time the trust comes into existence the purpose has already been fulfilled (for example, a trust to build a new church in a specific area but by the time the trust comes into existence one has already been built);

d) an incorrect name is given for the benefiting organization but there is more than one possible organization which could have been intended;

e) a named organization never existed and no existing organization would appear to be the one intended;

f) a named organization ceases to exist prior to the trust coming into effect;

g) the method of fulfilling the purpose is not legally possible (for example, a trust to build a hospital in a part of the city zoned for heavy industry and the city refuses to rezone the area).

Impracticability or impossibility can be either initial, that is, occurring when the trust comes into effect, or supervening, that is, arising after the trust has been in operation. It is important to note that a charitable purpose which is impracticable or impossible to fulfil as described is not in the strictest sense uncertain. The mode is sufficiently described and understandable; however, it is simply impossible to carry it out. Consequently, what is actually sought in a *cy-près* application is a variation of the method outlined by the creator.

If any uncertainty exists, it is not in the method to be applied but rather in understanding the scope of the creator's intentions. Did the creator really intend to limit the scope of his or her purpose to the method outlined? If it is determined that the trust is for a specific charitable purpose, the *cy-près* doctrine cannot vary the mode and the trust will fail. If, however, the court can determine that the creator meant to benefit charity or an area of charity generally, then *cy-près* can be applied. If this general charitable intent is present, the court is free to choose an alternative method of fulfilling the trust which is as close as possible to the one outlined by the creator.

(iii) effect of *cy-près* and scheme-making

The two doctrines of *cy-près* and scheme-making can correct uncertainty created by errors, vagueness or changes of circumstances. As a result, charitable trusts are rarely invalid due to uncertainty.

3. Non-charitable Purpose Trusts

A non-charitable purpose trust is similar to a charitable trust in that it is created with a view to furthering or supporting some purpose. However, its purpose does not come within the legal definition of charity, regardless of how worthy it might be, and thus such a trust cannot take advantage of the flexibility allowed to charitable trusts. As a result, non-charitable purpose trusts must address the difficult tasks of satisfying the enforceability and certainty requirements.

(a) Enforcement

A non-charitable purpose trust does not have a legal person to enforce it and no enforcement obligation on the part of the Crown has ever been recognized. This creates a fundamental problem. Traditionally, this lack of enforceability has required non-charitable trusts to be declared invalid.

There are sound reasons opposing the existence of a trust which cannot be enforced. First, the lack of enforcement results in a lack of obligation on the trustee to comply with the trust instructions.

> . . . [A] trustee would not be expected to be subject to an equitable obligation unless there was somebody who could enforce a correlative equitable right, and the nature and extent of that obligation would be worked out in proceedings for enforcement.[24]

Secondly, it is dangerous to allow for the growth of large trust funds which cannot be controlled by court judgments and directions. Such control is impossible without a person who can bring neglect or abuse of the trust fund to the court's attention. In the words of Lord Roxburgh,

> . . . if the purposes are not charitable, great difficulties arise both in theory and in practice. In theory, because having regard to the historical origins of equity it is difficult to visualize the growth of equitable obligations which nobody can enforce, and in practice, because it is not possible to contemplate with equanimity the creation of large funds devoted to non-charitable purposes which no court and no department of state can control, or in the case of maladministration reform.[25]

Historically, the court recognized only beneficiaries as having the right and interest in enforcing trusts.[26] With no beneficiary existing in non-charitable purpose trusts, the courts consistently found that they failed for lack of a person to enforce them.[27] Only a handful of non-charitable purpose trusts were recognized and they are now considered to be anomalies in the law.[28] Then, in 1968, the case of *Re Denley's Trust Deed*[29] attempted to recognize the right of enforcement of non-charitable purpose trusts in individuals other than beneficiaries.

In *Re Denley*, a settlor created a trust for the establishment and operation of a sports and fitness facility for his employees. In the course of reviewing whether the trust was a purpose trust or not, Goff J. stated that trusts which further non-charitable purposes are not inherently invalid. These trusts failed if they lacked the ability to be enforced or were uncertain. Furthermore, Goff J. stated that a traditional beneficiary was not necessarily required for the issue of enforceability to be satisfactorily resolved. He felt that the presence of an individual who could show a direct or tangible benefit could counteract the mischief created by the absence of a true beneficiary. The existence of such a person was sufficient to satisfy the requirement of enforceability. Only if a direct or tangible benefit could not be shown would the requirement be unsatisfied and the trust fail.

> I think that there may be a purpose or object trust, the carrying out of which would benefit an individual or individuals, where that benefit is so indirect or intangible or which is otherwise so framed as not to give those persons any locus standi to apply to the court to enforce the trust. . . .[30]

Goff J. limited failure by reason of unenforceability to trusts whose purposes were abstract, having little direct benefit to people.

Within Manitoba, *Re Denley* and the recognition of enforceability rights in individuals other than traditional beneficiaries has been accepted in the case of *Keewatin Tribal Council Inc.* v. *Thompson*.[31] In that case, the Keewatin Tribal Council Inc., whose members were a number

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[24] *Re Astor's Settlement Trusts*, *supra* n. 20 at 541.

[25] *Re Astor's Settlement Trusts*, *supra* n. 20 at 541-2.

[26] As we have seen, an exception was made for charitable trusts which have an appointed enforcer, the Crown.

[27] See *Morice* v. *Bishop of Durham*, *supra* n. 19; *Bowman* v. *Secular Society, Ltd.*, [1917] A.C. 406 (H.L.); *In re Wood*, [1949] Ch. 498; *Re Astor's Settlement Trusts*, *supra* n. 20; *In re Shaw*, *supra* n. 13; *Leahy* v. *A.G.N.S.W.*, [1959] A.C. 457 (P.C.); and *Re Endacott*, [1960] Ch. 232 (C.A.).

[28] See *Mitford* v. *Reynolds*, *supra* n. 12; *In re Dean*, *supra* n. 12; *Pettingall* v. *Pettingall*, *supra* n. 12; *Pirbright* v. *Salway*, *supra* n. 10; *In re Hooper*, *supra* n. 10.

[29] *Re Denley's Trust Deed*, [1968] 3 All E.R. 65 (Ch.).

[30] *Id.*, at 69.

[31] *Keewatin Tribal Council Inc.* v. *Thompson*, *supra* n. 9.

of northern and northeastern Manitoba Indian bands, was the trustee of three residential properties in Thompson used for the housing of member band children attending high school in that city. The City of Thompson assessed the three properties for property tax. The Keewatin Tribal Council Inc. argued that the properties were exempt under *The Municipal Assessment Act* which excluded from taxation ". . . lands held in trust for any tribe or body of Indians."[32] Counsel for the City of Thompson asserted that the bands were unincorporated associations and could not be recognizable beneficiaries, as unincorporated associations are not legal persons. It was further argued that the trust was invalid as it was a non-charitable purpose trust and lacked the ability to be enforced.

Jewers J. found that member band children and the bands themselves derived direct benefit from the trust and thus had sufficient standing or right to enforce. Furthermore, the case pointed out that the *Queen's Bench Rules* now give associations a legal right to sue or be sued[33] and, thus, an ability to have standing before the court to enforce a purpose trust established to support the association. This is a significant departure from past cases which did not recognize an association as having the right to enforce a non-charitable purpose trust. Consequently, the non-charitable purpose trust was recognized as being enforceable and valid. This case has given non-charitable purpose trusts a foothold on validity in this province.

(b) Certainty

After enforcement, the issue of certainty is the greatest stumbling block to the validity of non-charitable purpose trusts. A non-charitable purpose trust will be certain if it is sufficiently clear. A trustee or a court must be able to determine with clarity the purpose of the trust and the method that is to be employed to achieve the purpose.[34]

> If . . . an enumeration of purposes outside the realm of charities can take the place of an enumeration of beneficiaries, *the purposes must*, in my judgment, *be stated in phrases which embody definite concepts and the means by which the trustees are to try to attain them must also be prescribed with a sufficient degree of certainty.*[35]

The courts have little freedom to reapply the funds of a non-charitable purpose trust if the trust purposes and method of operation are not clear. Whereas charitable trusts may be saved through the application of scheme-making and *cy-près*, non-charitable purpose trusts have no such mechanisms to cure uncertainty.

> The object of the trust is the attainment of the purpose, and certainty of object applies in that one must know fairly definitely what the testator had in mind. There is apparently no such thing as a scheme in non-charitable purpose trusts.[36]

As a result, a non-charitable purpose trust which is uncertain will fail and cannot be saved.

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[32]*The Municipal Assessment Act*, C.C.S.M. c. M226, s. 2(2)(b).

[33]*Queen's Bench Rules*, R. 8.10: "A proceeding may be brought by or against an association in the name of the association."

[34]There may be a different rule of certainty for non-charitable purpose trusts which provide a direct or tangible benefit to individuals. In *Re Denley's Trust Deed*, *supra* n. 29, Goff J. stated that certainty exists if the individuals who benefit from the trust are ascertainable, that is, are adequately described. This echoes the certainty rules of person trust law and may be particular to cases involving purpose trusts for the direct benefit of individuals or it may be that the *Denley* trust was a person trust, not a purpose trust.

[35]*Re Astor's Settlement Trusts*, *supra* n. 20, at 547 [emphasis added].

[36]Lovell, *supra* n. 17, at 95.

C. IS REFORM NEEDED?

To date, few non-charitable purpose trusts have survived the various bars to validity. In Manitoba, *Keewatin Tribal Council Inc.* v. *Thompson* and the changes to the *Queen's Bench Rules* have provided a means by which some non-charitable purpose trusts may be found to be valid. Unfortunately, these advancements cannot aid all non-charitable purpose trusts. Though *Keewatin* recognizes enforcement rights in individuals who can demonstrate a direct or tangible benefit from non-charitable purpose trusts, the case is inapplicable to abstract trusts, as they do not directly benefit people. As well, the law remains unclear as to when the benefit will be considered to be sufficiently direct or tangible. For example, a trust for an environmental purpose may benefit the population of this province as a whole, but will that benefit be sufficiently direct to allow individuals to enforce it?

The case law also has not developed the limits of the enforcement power held by benefiting individuals. Do they have the power to compel the trustee to carry out the trust instructions or only the power to restrain the trustee from improperly using the funds? To what extent can they monitor the trust activities and how intrusive can they be? Can they look at the trust documents? The law has yet to answer these questions. As for the changes in the *Queen's Bench Rules*, they apply only to associations and their ability to enforce a trust for their benefit. In time, the case law could develop further and allow for the validation of non-charitable purpose trusts generally, but such a development is by no means guaranteed.

Non-charitable purpose trusts fail if they cannot meet the requirements of enforceability and certainty. They are not, however, inherently invalid as a vehicle of gifting as they do not violate public policy concerns. If a specific disposition is against public policy, such as a bequest that encourages criminal activity, it will of course be struck down just as any other type of trust would be struck down if it injured the public interest. Given that, in the majority of cases, the bequests are intended to aid society or some segment of it, it is difficult to conceive of any significant reason why the law should not assist non-charitable purpose trusts in overcoming the obstacles to validity.

Invalidity results in the wishes of the trust's creator being frustrated and places a limit on the freedom of disposition of property. If a person wishes to dispose of his or her property so that it furthers a non-charitable purpose, the use of a trust is severely limited, though no such limits exist for other kinds of vehicles, such as a corporation. The general invalidity of non-charitable purpose trusts also obstructs trusts which, though not charitable, are nevertheless worthwhile; ". . . some purpose trusts represent desirable social experiments falling outside the realm of charity."[37]

Although it is beyond the scope of this Report to touch upon all the areas in which non-charitable purpose trusts may have an impact, an example of their potential use is in furthering environmental causes. A specific illustration is the Trusteed Environmental Fund or TEF.[38] These Funds can be established to ensure that there are adequate monies available to reclaim or rehabilitate an area after an industrial enterprise, such as a mining operation, has concluded. For example, a portion of the profits of each metric tonne mined may be placed in a trust for the purpose of using the money at a future date to restore the mining area to its original state.

TEFs are an alternative to the methods of encouraging reclamation which are currently in place. These include the taxation of the operator, by a tax per tonne on the product or by license

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[37]L. McKay, "Trusts for Purposes -- Another View" (1973), 37 Conv. 420 at 434. See also J.W. Harris, "Trust, Power and Duty" (1971), 87 L.Q.R. 31.

[38]Information pertaining to current reclamation funding methods is taken from reports prepared by D.W.M. Waters for the Yukon Territory Water Board on Trusteed Environmental Funds. The first report is dated June 1989, and the second is dated November 1989.

fees, security deposits posted by the operator with the government before operations are commenced and performance bonds, usually made by sureties such as the operator's banker. In Manitoba, the security deposit method is used.[39] These methods are usually not intended to fund the reclamation but merely to deter mining companies from shirking their responsibilities. Consequently, the funds raised by these methods can be insufficient to cover the cost of reclamation. Where significant funds are required at the beginning of operations (when costs are great and profits small), they may also be burdensome to the operator and act as a disincentive to investment.

TEFs are intended to provide sufficient funding for reclamation, while at the same time allowing the operator to have the use of capital that otherwise would have been committed to security deposits, license fees or bonds. A TEF is a trusteed investment fund, that is, a trust in which any income is added to the capital of the fund so that the fund can grow until it is needed. It is not designed to create income for distribution.

> When it is used for environmental reclamation purposes, it is not intended to produce maximum income return for the retiree or maximum capital growth for the working investor, as is a real estate investment trust; it is intended, like the trusteed pension plan, to produce a certain sum at a certain point in time.[40]

Theoretically, TEFs should build up a reservoir of money over a course of time from periodic payments into it and investment income. Only if there is an early abandonment of the mine or an unanticipated decrease in the fund's investment returns is there a danger that the trust fund would have insufficient funds for the reclamation project.

Use of TEFs need not be restricted to governments. Lenders may also insist on them in the wake of *Panamericana de Bienes Y Servicios S.A.* v. *Northern Badger Oil and Gas Ltd.*[41] This Alberta Court of Appeal case decided that the cost of environmental clean-up was to be paid from the assets of a bankrupt company in priority to the company's creditors. Indeed, the Court indicated that the obligation of the receiver might exceed the assets of the company. To safeguard their investments, lenders in future may wish to require that a debtor create a non-charitable purpose trust to provide for environmental expenses.

TEFs lend themselves easily to a non-charitable purpose trust format but, at present, such a format cannot be used, given the problem of enforceability. Thus, any existing TEFs must use a private trust structure by incorporating a beneficiary who is either a legal person or the Crown. Validating non-charitable purpose trusts will allow TEFs to be established without such artificialities.

D. SUMMARY

Though the developments in the law of non-charitable purpose trusts in this province are encouraging, there is still a substantial need for reform. As we have seen, the invalidity of non-charitable purpose trusts arises from their inability to meet the technical requirements imposed by the law on trusts generally and the failure of the law to extend to non-charitable trusts the remedies which have allowed charitable trusts to satisfy these requirements. The result has been the frustration of the wishes of settlors and testators and the arbitrary inability to use non-

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[39]Operators of quarry mines must file and keep current rehabilitation plans and must make a cash deposit with the government ranging from $5,000 to $50,000 depending on the number of quarries: *Quarrying Minerals Regulation, 1976*, Man. Reg. 433/87R, Part VI.

[40]Report by D.M.W. Waters to the Yukon Territory Water Board on Trusteed Environmental Funds, June, 1989, at 17.

[41]*Panamericana de Bienes Y Servicios S.A.* v. *Northern Badger Oil and Gas Ltd.*, [1991] 5 W.W.R. 577 (Alta. C.A.).

charitable purpose trusts for worthwhile projects. We are convinced that methods can be devised to address the problems of enforceability and certainty and permit the validation of non-charitable purpose trusts.

RECOMMENDATION 1

The law should be reformed so that the technical barriers to the validity of non-charitable purpose trusts are overcome.

CHAPTER 3

OVERCOMING THE ENFORCEMENT PROBLEM

In this Chapter, we examine four mechanisms which might be employed to overcome the technical impediments to the validity of non-charitable purpose trusts:

1) the definition of charitable trust could be expanded to include some or all trusts currently considered to be non-charitable;

2) the non-charitable trust could be converted into a simple power;

3) the enforcement requirement could be abolished; or

4) an enforcer could be designated by statute.

We then examine the issues surrounding the implementation of our preferred option.

A. OPTIONS FOR REFORM

1. Expand the Definition of Charity

One method of validating some non-charitable purpose trusts is to expand the definition of charity. By doing so, more purpose trusts would have an enforcer through the Crown. As well, more purpose trusts would have the remedies of *cy-près* and scheme-making available to them to correct any problems of certainty.

A wide range of options is available in determining the scope of the definition. The expansion could be limited to adding only one or two purposes. For example, England enacted the *Recreational Charities Act, 1958*[1] which stated that providing recreational facilities in the interests of social welfare would be considered charitable.[2] However, expanding the definition of charity in this way is essentially a piecemeal response which does not solve the overall problems of non-charitable purpose trusts. Many purpose trusts would continue to fall outside the definition of charity.

Charity could instead be completely redefined as being any purpose that can be said to be beneficial to the public.

> The general principle, I submit, is . . . that a trust whose purpose is beneficial to the community is prima facie a valid charitable trust, unless for some reason of public policy it should be held to be

[1] *Recreational Charities Act, 1958* (U.K), 6 & 7 Eliz. 2, c. 17. The recreational facilities would be considered to be provided "in the interests of social welfare" if they were provided for persons who needed them "by reason of their youth, age, infirmity or disablement, poverty or social and economic conditions" or if they were made "available to the members or female members of the public at large": s. 1(2).

[2] The introduction of the *Recreational Charities Act, 1958* was in response to the case of *Inland Revenue Commissioner* v. *Baddeley*, [1955] A.C. 572 (H.L.), which raised doubts about the validity of a number of large operating trusts which had as their purposes the promotion of social and recreational institutions.

> invalid. In other words, benefit to the community should, with the exception to which I have just referred, be both a necessary and a sufficient requirement for a valid charitable trust.[3]

However, a significant problem arises in defining public benefit. The concept is fairly well understood in the context of charitable trusts and, consequently, the courts might be tempted to continue to use the traditional definition of charity in construing the meaning of "public interest". Even if a more expansive view were taken of the meaning of public benefit, there will always be a group of non-charitable purpose trusts which will not qualify, either because the number of people deriving benefit is too small or the beneficial element is too abstract or intangible to measure. Consequently, though some non-charitable purpose trusts may be saved, the failure of many non-charitable purpose trusts can still occur.

An even more expansive approach would be to treat all purpose trusts as charitable trusts. By making no distinction between the nature of the purposes, that is charitable or non-charitable, the only determination needed would be whether the trust benefits persons or a purpose. The court would not need to consider whether a purpose fell under one of the recognized heads of charity or whether it had a public benefit element; the result would be the elimination of the minute distinctions which currently entangle an area of the law "riddled with arcane and archaic learning, hair-splitting distinctions, irreconcilable authorities and anomalies for which nobody ever dares offer any explanation other than their history."[4]

However arcane the law of charitable trusts is, though, it is at least underpinned by the existence of an element of public benefit, justifying the various privileges that are extended to them. The same cannot be said for all non-charitable trusts. The Crown will not be an appropriate enforcer for some purpose trusts either because of a total lack of interest (for example, an abstract purpose such as the creation of a new alphabet) or because of the possibility of a conflict of interest (for example, a trust to support a particular political party, especially an opposition party). Other purpose trusts may demand an element of privacy which is not possible when a public body such as the Crown is the enforcer. Furthermore, the remedies which are now available to charitable trusts, scheme-making and *cy-près*, would have to be refashioned beyond recognition. The operation of *cy-près* is dependent upon the finding of a general charitable intent which, in turn, requires a discrete definition of charity. If the definition of charity has no bounds and encompasses every purpose trust, then there will never be a situation where the remedies are not available, even if it would create an absurd result and prevent those with a remainder interest or heirs from realizing a benefit. On the other hand, if the availability of these remedies is restricted to purpose trusts which were previously considered to be charitable, then the point of treating all purpose trusts as charitable is lost.

Finally, even if all purpose trusts are treated as charitable trusts on the issue of validity, a distinction will continue to be made between charitable and non-charitable purposes when tax status is at issue. Obtaining charitable status from Revenue Canada allows a trust many significant tax advantages. It is unrealistic to believe that Revenue Canada will wish to extend tax advantages to all purpose trusts. As a result, a distinction between charitable and non-charitable trusts would inevitably continue to exist and the attempt to eliminate the line between them would be circumvented.

Bermuda experimented with removing the distinction between charitable and non-charitable trusts.[5] However, despite a purported attempt to apply the same law to both types of

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[3]P.C. Hemphill, "The Civil-law Foundation as a Model for the Reform of Charitable Trusts Law" (1990), 64 Aust. L.J. 404 at 409.

[4]*Id.*, at 405.

[5]*Trusts (Special Provisions) Act 1989* (Bermuda), 1989, No. 62.

trusts, the legislation ultimately retained the distinction by allowing charitable trusts - and only charitable trusts - to escape failure if they did not comply with the requirements of the statute. In other words, even Bermuda has recognized that some purpose trusts deserve more privileges than others.

Consequently, it seems clear to us that a minor expansion of the definition of charity does not address the problems faced by non-charitable purpose trusts, while a major expansion addresses the problems in an essentially unworkable and unjustifiable way.

2. Change the Trust to a Power

Another way of overcoming the enforcement problem is to treat non-charitable trusts as if they were simple powers. A power is another legal mechanism which occurs when the owner of property gives to another an express authority to deal with that property in a certain manner. A power has two parties: a creator, or donor, and a power holder. Like the trustee of a trust, the power holder does not have a beneficial interest in the property. As well, the power holder cannot deviate from the creator's instructions and can be restrained from abusing the assets. However, though the power holder has the authority to deal with the property in the manner directed by the creator, he or she, unlike a trustee, is under no obligation to do so. The donor relies on the integrity of the holder to carry out the instructions. Consequently, an enforcement mechanism is not required for a power.

> There is no duty to exercise a discretionary power; it is not a trust; and the general principles which make a trust void for uncertainty since no one can enforce it, have no application.[6]

Since powers require no enforcement mechanism, failure of non-charitable purpose trusts can be avoided by converting these trusts into powers. The provinces of Ontario, Alberta, British Columbia, and both the Northwest and Yukon Territories, have done just this. They have enacted legislation providing that a specific non-charitable purpose trust shall be treated as a power for a period of 21 years, unless the court believes that the creator would have preferred to see the bequest fail rather than be limited in its duration.[7] The trustee becomes a power holder with an ability, though not an obligation, to spend the money for the specific non-charitable purpose outlined by the creator. Once the power ceases to exist, there is generally a prescribed gift over to those who would have been entitled to the assets, had the trust failed at the time it came into effect.[8]

Converting the trust into a power may save it from failing, but it will also create a fund of money or property with little protection from languishing. Languishing occurs when the power holder does nothing to exercise the power either by choice or by reason of neglect, with the result that the fund sits unused. Although the heirs can seek a termination of the power in these circumstances, it is generally quite difficult to prove unless there is total inactivity over a long period of time. For example, the power holder may simply argue that he or she is waiting for the right moment to act and that the inactivity is, in fact, purposeful. Given these difficulties, a trust converted to a power could be forgotten by the only probable monitors of the fund, the creator's heirs, and languishing would be unchecked.

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[6] *Re McEwen*, [1955] N.Z.L.R. 575 at 583 (N.Z.S.C.).

[7] See *Perpetuities Act*, R.S.B.C. 1979, c. 321, s. 21(1). For the other jurisdictions having similar if not identical legislation, see *Perpetuities Act*, R.S.O. 1990, c. P.9, s. 16(1), *Perpetuities Act*, R.S.A. 1980, c. P-4, s. 20(1), *Perpetuities Act*, R.S.N.W.T. 1988, c. P-3, s. 17(1) and *Perpetuities Act*, R.S.Y. 1986, c. 129, s. 20(1).

[8] *Perpetuities Act*, R.S.A. 1980, c. P-4, s. 20(2), *Perpetuities Act*, R.S.O. 1990, c. P.9, s. 16(2), *Perpetuities Act*, R.S.Y. 1986, c. 129, s. 20(2), *Perpetuities Act*, R.S.N.W.T. 1988, c. P-3, s. 17(2). The British Columbia legislation differs slightly in that it appears to prescribe the gift over to those who would have been entitled to the assets had the trust determined at the end of the 21 year period: *Perpetuity Act*, R.S.B.C. 1979, c. 321, s. 21(2).

The easiest way to guard against languishing accounts is to provide in legislation for a termination date for the power. This ensures that the question of the fund's status will arise at some point and also increases the chances of heirs remaining interested in the power. Although this is logical in other jurisdictions, it would create a strange anomaly in Manitoba. Elsewhere, trusts are already subject to vesting requirements imposed by the rule against perpetuities. A time limit on the life of powers would be entirely consistent with this doctrine. However, in Manitoba, the rule against perpetuities has been abolished and, accordingly, trusts are capable of perpetual existence without change and contingent interests need not vest within a set time. It would be odd indeed to impose a time limit on a power that had begun life as a trust which, had it continued to be treated as such, could have gone on indefinitely with no change in status.

The more important objection though to converting non-charitable trusts to powers is that such a reform would seriously alter the intentions of the creator. If a creator wishes to use a power to further a non-charitable purpose, he or she is free to do so. However, by choosing to establish a trust rather than a power, the maker of such an instrument has expectations that the purposes will be carried out as described and that there will be an obligation to do so. The method chosen to give effect to a creator's intentions should not be one which, in fact, subverts them; non-charitable trusts should not be made effective by taking away their effectiveness and reducing them from obligations to mere suggestions.

3. Abolish the Enforcement Requirement

A more direct approach might be to simply abolish the requirement that non-charitable purpose trusts be enforceable. Arguably, the importance of this requirement has been overstated. With person trusts, effective enforcement is dependent upon the beneficiaries having adequate resources and conscientiously monitoring the trust. Clearly, this is not always the case: often, the requirement of enforcement may be satisfied in theory, but not in practice. Even with charitable trusts, there is no active monitoring by the appointed enforcer, the Crown; it is moved to act only when a complaint is received. In short, having an enforcement mechanism is no guarantee that there will be effective enforcement.

In the absence of an enforcement requirement, the integrity of trustees could be relied upon to ensure that non-charitable purpose trusts are carried out. Most trustees will act honestly and do what is required by the trust. Careful selection of the trustee can decrease any risk of abuse or neglect of the trust. Though requiring no enforcement mechanism may result in some abuse occurring, it has been argued that this may be acceptable if an entire group of trusts can be given validity.

> In the vast majority of cases, the trustees would naturally carry out the settlor's wishes anyway, . . . without need for enforcement. In these cases, then, the facilitative policy would gain nothing by insisting on enforceability, but lose much, because the whole category of unenforceable trusts would be thereby denied to settlors.[9]

However, as we have already pointed out in Chapter 2, there are significant reasons supporting the enforcement requirement and abolishing the requirement would have negative consequences. First, it removes all safeguards against trust abuse. Even an imperfect method of enforcement will act as a deterrent to breaches of trust and it is probably naïve to believe that some form of deterrent or supervision is not required. Secondly, the lack of an enforcement mechanism would increase the difficulty of bringing a breach to the attention of a court by a concerned person. Finally, if there is no enforcement mechanism, the creators of non-charitable purpose trusts will lack confidence that the purposes of their trusts will be carried out; abolishing

[9]S. Gardner, *An Introduction to the Law of Trusts* (1990) 190.

the enforcement mechanism could have the ironic effect of reducing the number of instances in which the non-charitable purpose trust is used.

4. Designate an Enforcer

Given our acceptance of the need for enforcement in non-charitable purpose trusts, a further option would be to provide someone to play the role of enforcer. A non-charitable purpose trust has two parties, a creator and a trustee, but lacks a third party or beneficiary. To create parity with trusts that have beneficiaries, an enforcer position could be created. In effect, the enforcer would be equivalent to a beneficiary in areas of enforcement.

Legislation could simply state that specific persons would have the right to enforce non-charitable purpose trusts. The Law Reform Commission of British Columbia recently expressed support for this approach, suggesting that enforcement come from the settlor, the personal representative of the settlor, the Attorney General, the trustee or any person appearing to a court to have a sufficient interest in the enforcement of the trust.[10] Although they have suggested that a right of enforcement should rest in these parties, the creation of a formal position of enforcer is not proposed.

In effect, the enforcer is given standing in court to complain that a non-charitable purpose trust is not being carried out in accordance with the wishes of its creator. This means that the enforcer has rights, but not obligations. The enforcer may complain to a court about the inappropriate stewardship of a non-charitable purpose trust, but is under no obligation to do so. This creates the possibility of enforcement, without ensuring that it will actually occur. In our view, this does not go far enough.

Bermuda has passed legislation which provides that a non-charitable purpose trust will be valid if the creator names an enforcer and provides a method of appointing successors. The legislation, however, fails to address a number of crucial issues which influence the effectiveness of the enforcement process. First, the obligations of the enforcer are not stated, nor are there any remedies prescribed for an enforcer who fails to enforce. Secondly, the Bermuda legislation does not fully address the problem of scrutinizing or replacing the enforcer. The legislation states that, where a trustee has reason to believe that the enforcer is dead, or is unwilling, unfit or refuses to act or is incapable of acting, then the trustee is under an obligation to inform the Crown. The Crown, however, simply *may* apply to a court for the appointment of a person to enforce the trust.[11] There appears to be no obligation on the Crown to seek an appointment. Should the Crown choose not to seek the appointment of another person for the position of enforcer, it is unclear whether the Crown takes on the responsibility. Furthermore, the legislation fails to outline a mechanism for dealing with the removal of enforcers who are acting improperly. In addition, there is no provision to allow others to bring the matter to the court's attention.

Although the Bermuda legislation may not have thoroughly anticipated all of the relevant issues and concerns, it is still a very useful example. The problems which we have detected provide insight into the areas which need careful consideration. We are convinced that, subject to the solution of these defects, a reform which creates an enforcer position will be the best method of removing the enforcement impediment to the validity of non-charitable purpose trusts. It will allow settlors and testators to have the freedom to dispose of their property and to have

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[10]Law Reform Commission of British Columbia, *Non-Charitable Purpose Trusts* (Working Paper #66, 1991) 41.

[11]*Trusts (Special Provisions) Act 1989* (Bermuda), 1989, No. 62, ss. 13(2) and 13(3).

their wishes fulfilled to the greatest extent possible. It should also assure creators that their trusts will be perpetual and private.

RECOMMENDATION 2

The law should be reformed to create a position of enforcer within all non-charitable purpose trusts.

As a result, enforcement would continue to be a necessary condition of the validity of non-charitable trusts. However, this requirement would be satisfied by the creation and existence of the enforcer position. Although vacancies may occur in the position from time to time, the vacancies should not cause the trust to fail, just as a vacancy in the position of the trustee does not cause failure of the trust. The existence of a mechanism for filling vacancies in the position provides the necessary assurance of continued enforcement.

RECOMMENDATION 3

The absence of a person occupying the position of the enforcer of a non-charitable purpose trust should not in itself invalidate the trust.

B. IMPLEMENTING REFORM

In this part of the Chapter, we address the implementation of our proposal to create a position of enforcer within non-charitable purpose trusts. Consideration is given to the following issues:

- What should the duties of the enforcer be?
- Who should the enforcer be?
- How should the enforcer be appointed?
- How should the enforcer be removed or replaced?

1. Duties and Powers of the Enforcer

The duty of the enforcer should be to monitor the non-charitable purpose trust to ensure that it is being carried out by the trustee in accordance with the wishes of its creator. He or she should carry out these duties with diligence and care. Given that in matters of enforcement the enforcer holds a position akin to that of a private trust beneficiary, the enforcer should monitor and enforce the trust as if he or she were a beneficiary of the trust, that is, as if he or she had a beneficial interest in the trust. Accordingly, the actions that a beneficiary might reasonably be expected to take to monitor and enforce a trust should be the actions taken by an enforcer. The enforcer's activities might include compelling the trustee to carry out the trust purposes, restraining the trustee from maladministration, ensuring that the trustee exercises, in a timely fashion, any discretion he or she may have and dealing appropriately with breaches of trust. In order to carry out these duties, it follows that the enforcer should have all the remedial and enforcement rights and powers that a beneficiary has.

RECOMMENDATION 4

The enforcer should monitor and enforce a non-charitable purpose trust with the same diligence and care of a person who had a beneficial interest in the trust. Accordingly, the trustee should have all the remedial and enforcement rights and powers of a beneficiary of a trust that are required to carry out these duties.

Should the enforcer fail to perform his or her duties, the remedies that would be available are difficult to prescribe. At the very least, a mechanism for removal is recommended. Whether there should be liability for damages, however, is a question best left to the courts, to be determined in light of the circumstances of specific cases. We note with interest that, though the Crown is the appointed enforcer for charitable trusts, there is little to indicate what consequences would occur if it failed to perform its enforcement role adequately.

2. Who Should Be the Enforcer

As in the case of charitable purpose trusts, the most obvious candidate for the position of enforcer would be the Crown, that is, the provincial government, acting through the Minister of Justice and Attorney General. The Crown can provide perpetual enforcement and has more resources at its disposal than do individuals (such as its own legal department), perhaps allowing for more effective enforcement. Furthermore, the Crown is a logical enforcer for those non-charitable purpose trusts which have an element of public benefit. Significantly, the recent proposals of the Law Reform Commission of British Columbia included the Crown as one of the parties who would have standing to enforce a non-charitable purpose trust in court.[12]

However, employing the Crown to enforce non-charitable purpose trusts would pose difficulties which we have previously discussed. First, as with charitable trusts, the Crown might not, in fact, monitor non-charitable purpose trusts and may be dependent upon interested parties to bring problems to its attention; the actual effectiveness of such enforcement is open to question. Secondly, the Crown, more than other enforcers, could be susceptible to conflicts of interest. Some non-charitable purpose trusts could be in opposition to the policies of the government; indeed, some non-charitable purpose trusts might be established to support an opposition political party. The provincial government could be placed in a difficult position if it were obliged to enforce such trusts and in an even more difficult position if it were accused of not enforcing such trusts with sufficient zeal. Finally, involving the Crown as enforcer would nullify one of the key advantages of the non-charitable purpose trust - privacy - and may deter many from using it.

It seems to us that the better solution is to place the selection of the enforcer in the hands of the person creating the trust. Who better than the trust's creator to choose a reliable and trustworthy person who will zealously ensure that the trustee will carry out the trust's purposes? The creator could choose any party to be the enforcer including himself or herself or even the Crown. Furthermore, the ability to appoint an enforcer should include the naming of successive enforcers. A trust would benefit from the long-term enforcement that successive appointments could give.

It is possible that a creator may wish to entrust the selection of an enforcer to another person. For example, a trust document might provide that "I give $100,000 in trust for the development of a global language and I delegate Dr. X, the leading expert in global language

[12]Law Reform Commission of British Columbia, *supra* n. 10.

studies, to appoint the enforcer to the trust." Just as the law permits the creator of a trust to give to another the power to appoint the trustees of the trust, we would also permit the creator of a trust to delegate to another the power to select the enforcer. This increases the likelihood that choices will be made in accordance with the creator's intentions.

RECOMMENDATION 5

The enforcer of a non-charitable purpose trust should be a person or persons appointed by:

a) the settlor or testator, or

b) the person named by the settlor or testator for the purpose of appointing enforcers (the delegate).

RECOMMENDATION 6

The settlor, or the delegate should be permitted to appoint a succession of enforcers.

There is one reasonable limitation to apply to the filling of the enforcer position. The position of trustee and enforcer of a non-charitable purpose trust should not be held by the same person. Since the role of one is to monitor the activities of the other, the conflict of interest is self-evident.

RECOMMENDATION 7

The trustee of a non-charitable purpose trust should not also be the enforcer of the trust.

3. Filling Vacancies in the Position of Enforcer

Fundamental to the success of the enforcer position is an ability to fill vacancies. Some vacancies will arise at the outset of the trust, due to a failure on the part of the trust's creator to appoint an enforcer. Other vacancies will arise later in the life of a trust if an enforcer is removed, dies or resigns.

A mechanism for appointing a new enforcer, if a successor has not previously been named, should exist. To ensure that the vacancy will be dealt with promptly, an obligation should be placed upon the trustee to seek to have the vacancy filled when it comes to the trustee's attention. We suggest that the trustee have the option of seeking the appointment of a new enforcer from any one of the settlor, if living, the delegate (if one was named by the trust's creator), or the Court of Queen's Bench. Each of these should be equally empowered to make an appointment. Hopefully, the trustee will go to the most easily available and cost-efficient source.[13]

[13]Of course, if a trustee wilfully chooses to ignore a settlor or a delegate who is readily available and willing to make an appointment and instead puts the trust to the expense of a court application, it would be within the court's discretion to order that the costs of the application be paid by the trustee personally (rather than from the trust fund).

We see no problem with a settlor selecting new enforcers. Unlike the prohibition against a settlor selecting new trustees, which can be seen as an inappropriate exercise of control over the trust by the settlor, the selection of new enforcers does not give the settlor any significant degree of control over the trust. Since a person nominated for the purpose of appointing enforcers essentially stands in the shoes of the trust's creator, there similarly can be no complaint with this person selecting new enforcers.

Finally, the court should be available as an appointee of last resort or for circumstances where it is impossible or inappropriate to seek the appointment from the settlor or his or her delegate (for example, if there is no person with the power to appoint and the settlor is dead or if the settlor or another person with the power to appoint are incapacitated or unreachable).

RECOMMENDATION 8

Where a trustee of a non-charitable purpose trust has reason to believe that the trust has no enforcer, the trustee should be obliged to seek to have a new enforcer appointed by:

a) a settlor of the trust, if living;

b) a person named by the settlor or testator for the purpose of appointing enforcers; or

c) the Court of Queen's Bench.

4. Notice and Effective Date of Appointment

Important duties and responsibilities will be assumed by a person when he or she becomes the enforcer of a non-charitable purpose trust. It is hoped that those who wish to create non-charitable purpose trusts will contact the persons whom they intend to appoint as enforcer and seek their agreement before naming them to the position in the trust documents. For appointments by persons who have been nominated for that purpose or by the court, it is also hoped that the potential enforcer will be contacted prior to the appointment occurring. However, we recognize that this will not always take place; even where it does, the trust may not come into being until a considerable time after the enforcer has been approached. Accordingly, notice should be provided to the intended enforcer when the trust comes into existence, so that he or she can commence his or her duties or decline the position. Similarly, notice should be given to any person who is subsequently appointed to the position or who, by the terms of the trust document, succeeds to the position of enforcer (for example, upon the death of the first enforcer). The obligation to provide these notices should rest with the trustee, since he or she has knowledge of the contents of the trust and is thus in the best position to provide the notice.

RECOMMENDATION 9

Upon a non-charitable purpose trust coming into existence, its trustee should be obliged to advise the enforcer of that trust of his or her appointment to the position.

RECOMMENDATION 10

Where a non-charitable purpose trust has a vacancy in the position of enforcer, the trustee should be obliged to advise a successive enforcer, if one has been named, of his or her appointment.

RECOMMENDATION 11

Where a non-charitable purpose trust has a vacancy in the position of enforcer and the trustee seeks the appointment of an enforcer, the trustee should give written notice of the appointment when it is made to the person so appointed.

Where the settlor of a trust appoints himself or herself as enforcer, the appointment should be effective on the day the trust comes into existence. Formal notice is not required since the settlor knows the contents of the trust and of its existence. On the other hand, the appointment of a settlor as a successor enforcer should be effective only after the trustee has given notice of the succession. Where the appointment of an enforcer is made by the court, the appointment should be effective when the court order is made. We expect that the court will not make an appointment without first consulting the potential enforcer since a refusal of the position would require a further court application to be made. In all other cases, the appointment should be effective when written notice is received by the appointed person.

RECOMMENDATION 12

The appointment of an enforcer of a non-charitable purpose trust should become effective on the date when,

a) in the case of an appointment by the court, the court orders the appointment;

b) in the case of a settlor who names himself or herself as enforcer, the trust takes effect;

c) in all other cases, the appointed person receives written notice of the appointment.

As a result, the assumption of the office of enforcer, with its attendant duties and responsibilities, will depend on notification rather than on acceptance. However, the burden of an assumed acceptance on the part of an enforcer will be lessened by the freedom to resign.

5. Removal

Circumstances may arise which justify the removal of an enforcer. For example, an enforcer may become incapacitated by illness or may simply refuse to act; there may even be cases where an enforcer is collaborating with the trustee to misuse the assets of the trusts. At the same time, it is important to ensure that the ability to remove enforcers cannot itself be abused. It should not be possible for a trustee to obtain the removal of an enforcer who, inconveniently for the trustee, is acting in a vigilant manner. Similarly, it should not be possible for the creator

of the trust to change his or her mind and seek to undo the gift to the trust by substituting a compliant enforcer for a vigilant one.

For these reasons, we believe that only a court should be able to remove an enforcer. It should be able to do so at the request of those persons who have traditionally had standing before the court to address concerns pertaining to trusts. These would include trustees, the settlor (or a delegate), residuary beneficiaries, and individuals who derive a direct or tangible benefit from the trust. As well, persons who do not have standing before the court as of right should be permitted to apply for the removal of an enforcer if they have leave of the court to do so.

RECOMMENDATION 13

Where an enforcer cannot act or is not fulfilling the duties of the position, the Court of Queen's Bench should have the power to remove the enforcer upon application from:

a) the trustee of the trust;

b) a settlor or a delegate of the trust, if living;

c) a person who has a residuary interest in the trust;

d) a person who derives a direct or tangible benefit from the trust; or

e) such other person as a court may allow.

Furthermore, the same parties should be able to seek an order filling a vacancy. Even though there is a duty on the trustee to seek an appointment when a vacancy exists, it is wise to give to others the power, though not an obligation, to seek an appointment and thus ensure that, in the unlikely event that a trustee refuses to have the vacancy filled, there is another avenue to have it done.

RECOMMENDATION 14

An application for an order from the court to appoint an enforcer where a vacancy exists in the position may be brought by:

a) the trustee of the trust;

b) a settlor or a delegate of the trust, if living;

c) a person who has a residuary interest in the trust;

d) a person who derives a direct or tangible benefit from the trust; or

e) such other person as a court may allow.

When a court is asked to appoint an enforcer, notice should be given to the trustee, the settlor (or a delegate), if living, and persons with a residuary interest. A requirement that notice also be given to all persons deriving a direct or tangible benefit from the trust would be

impractical, since it may be impossible to identify that class of persons exhaustively with any certainty. Instead, the court should have a discretion to give notice to such other persons as it considers appropriate. For example, certain trusts with a public benefit may justify notice to the Crown. As well, the court might find it beneficial to notify the public of the application through newspaper advertisements. This might be a good way to give notice to those persons deriving a direct or tangible benefit from the trust; interested groups or individuals would be advised of the existence of the trust and might be prompted to come forward and seek to be named as enforcer. When a court is asked to remove an enforcer, notice should be given to the same persons, as well as to that enforcer so that, if desired, he or she can contest the removal.

RECOMMENDATION 15

Notice of an application for either an order for the appointment of an enforcer by the court or an order for the removal of an enforcer should be given to:

a) the trustee of the trust;

b) the settlor or the delegate of the trust, if living;

c) any person who has a residuary interest in the trust; and

d) such other persons as a court may direct;

and in the case of the removal of an enforcer, notice should also be given to the enforcer.

6. Resignation

After a person becomes an enforcer of a non-charitable purpose trust, he or she should be free to resign at any time by providing notice to the trustee of the trust. Since the enforcer is essentially a volunteer, it would be unreasonable - and certainly not in the interests of the trust - to insist that he or she carry on when he or she is unwilling or unable to do so. A requirement that resignation be in writing ensures that there is no ambiguity as to whether a vacancy exists and that the trustee clearly understands that he or she has an obligation to seek a new appointment or to notify a successive enforcer.

RECOMMENDATION 16

An enforcer of a non-charitable purpose trust may resign at any time by giving a written resignation to the trustee of the trust.

RECOMMENDATION 17

The resignation should be effective on the date specified in the resignation or on the date it is received by the trustee, whichever is the later.

7. Statute Prevails

As a general rule of trust law, instructions in a trust document take precedence over statute law. This is in keeping with the philosophy that the creator of a trust is free to dispose of his or her property as he or she sees fit. However, it would not be wise to allow the provisions of the legislation pertaining to the enforcement of a non-charitable purpose trust to be overridden by a settlor or testator. The ability to enforce is still critical to the validity of a non-charitable purpose trust. Altering the mechanism which gives some assurance that enforcement will occur will, at the very least, reduce the effectiveness of the enforcement and could potentially jeopardize the overall validity of the non-charitable purpose trust. For example, if a creator purported in the trust document to remove the requirement that the trustee give notice to a person who becomes an enforcer, the enforcement scheme would be seriously undermined; enforcement requires monitoring of the trust and the trustee, and if the appointed enforcer is unaware of his or her position, there will be no monitoring. Given that enforceability is essential to the validity of a non-charitable purpose trust, it should not be possible to avoid our proposed enforcement provisions.

RECOMMENDATION 18

The recommended provisions pertaining to the enforcement of non-charitable purpose trusts should govern all such trusts notwithstanding any contrary intention expressed by the creator of the trust.

8. Miscellaneous Issues

(a) Standing in court

The Trustee Act lists those persons who have standing to seek orders that touch upon the appointment of new trustees or the assets of the trust.[14] These are trust creators, persons with a beneficial interest and trustees. Clearly, the enforcer of a non-charitable purpose trust should also be included in this list, as effective enforcement and the fulfilment of the duties of the position can involve seeking such orders.

RECOMMENDATION 19

Section 5(1) of The Trustee Act should be amended to indicate that, in the case of a non-charitable purpose trust, the enforcer can apply for orders pertaining to the appointment of a new trustee, or concerning any land or personal estate subject to the trust.

(b) Passing of accounts

In order for the enforcer to carry out the duty of ensuring that the trustee is carrying out the terms of the trust, it is necessary that the enforcer have access to information concerning the activities of the trustee. In the case of person trusts, this is accomplished, in part, by provisions in *The Trustee Act* for the passing of the accounts of trustees. Trustees may, not more often than once a year, file their accounts with the court for approval; notice of that application is given to persons interested in the trust.[15] As well, a person interested in a trust may apply from time to

[14] *The Trustee Act*, C.C.S.M. c. T160, s. 5(1).

[15] *The Trustee Act*, C.C.S.M. c. T160, s. 86.

time for an order requiring that the trustee pass his or her accounts before a court; such a request cannot be made more than once a year.[16]

In our view, there are no special characteristics in a non-charitable purpose trust that would warrant passing of account requirements which are different than those applicable to other trusts.

RECOMMENDATION 20

Non-charitable purpose trusts should be subject to the same rules pertaining to the passing of accounts as other trusts.

(c) Remuneration

The Trustee Act allows a trustee, guardian, or personal representative to seek fair and reasonable remuneration for the efforts and time they may give in fulfilling the duties of their positions.[17] An enforcer should be allowed the same privilege, as he or she acts for the benefit of the trust.

RECOMMENDATION 21

The enforcer of a non-charitable purpose trust should be able to seek fair and reasonable remuneration for his or her care, pain, and trouble and the time expended in enforcing the trust.

[16]*The Trustee Act*, C.C.S.M. c. T160, s. 87(2).

[17]*The Trustee Act*, C.C.S.M. c. T160, s. 90(1).

CHAPTER 4

OVERCOMING THE CERTAINTY PROBLEM

Certainty is the second obstacle to the validity of non-charitable purpose trusts. All trusts must be certain; that is, the instrument establishing them must contain sufficient information that a trustee (or a court) can understand the instructions of the creator. If there is no inkling of the creator's intentions, then there is insufficient certainty and the trust fails.

In a purpose trust (both charitable and non-charitable), the trust must detail both the purposes to be supported and the means (or mode) by which the purposes are to be attained. Sometimes there is a problem with the purpose or the mode which jeopardizes the fulfilment of the trust. In this Chapter, we examine three problem areas:

1) the purpose of the trust is clear, but the mode is unclear;

2) the purpose and the mode of the trust are clear, but the mode is or becomes impossible, impracticable or obsolete; and

3) the purpose of the trust is unclear.

Over the years, the courts have developed remedies which have moderated the effects of these certainty problems on charitable and person trusts. However, non-charitable trusts have not benefited from these developments (in part, because the issue of their certainty rarely came before the courts; the lack of enforceability invalidated them before the issue could be raised). We will now consider whether the remedies which the courts have developed for charitable trusts can and should be applied to non-charitable trusts.

A. UNCLEAR MODE

Where the purpose of a charitable trust is certain, but the method of carrying out the purpose is not, the uncertainty can be remedied by scheme-making. The court can direct a mode, if one has not been given, or can fill in missing portions of a mode if the lack of detail creates uncertainty. The remedy also allows a court to find the correct beneficiary where the charitable organization which is to benefit has been described incorrectly or has merged with another.

Consider the following examples of charitable trusts with uncertain modes and the application of scheme-making to correct them:

Example: "the residue of my estate for the promotion of religious worship in Winnipeg"

No mode is given; because the charitable purpose of the trust is clear, the court can select a mode which, in its opinion, would have been approved or been acceptable to the creator of the trust.

Example: *"the residue of my estate in trust for St. Boniface University" where no such institution exists but, in all likelihood, the testator meant St. Boniface College*

Example: *"the residue of my estate for Soup Kitchen A" which has merged with Soup Kitchen B to become Soup Kitchen C while still serving the same area as the original Soup Kitchen A*

Scheme-making allows the court to discover or trace the intended organization and thereby clarify the trust's mode.[1]

Non-charitable purpose trusts have no remedy available to correct an unclear mode. "There is apparently no such thing as a scheme in non-charitable purpose trusts."[2] However, there appears to us to be no reason why courts could not devise schemes for non-charitable purpose trusts in the same way that they do for charitable trusts. So long as the creator's intentions are perceivable and clear, a framework could be established within which a court could develop schemes to fulfil the creator's trust objectives.[3] The following examples demonstrate how scheme-making could be applied to non-charitable purpose trusts with unclear modes:

Example: *"the residue of my estate to be used to stem the depopulation of rural Manitoba"*

No mode is given. As with charitable trusts, the court could choose a mode that the testator would have found acceptable, such as, creating or supporting a rural job creation programme.

Example: *"the residue of my estate in trust for the purchase of equipment for the Manitoba Blue Bombers" where, in all likelihood, the testator meant the Winnipeg Blue Bombers*

The court could attempt to ascertain the intended organization and clarify the mode by correcting its description.

Example: *"the residue of my estate to be used to support the Chicken Producers Association" when, at the time the trust comes into being, the Chicken Producers Association has merged with the Turkey Producers Association to form the Poultry Producers Association; the new Association carries out the same functions as were performed by the predecessor organizations*

So long as there is sufficient detail and evidence to make a tracing of the organization possible, the courts could devise a scheme to apply the benefits of the trust to the intended organization as it exists in its changed form.

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[1]If Soup Kitchen A had simply ceased to exist, then the mode would not have been unclear; it would have been impossible. See the discussion of impossible modes, *infra*.

[2]P.A. Lovell, "Non-charitable Purpose Trusts - Further Reflection" (1970), 34 Conv. 77 at 95.

[3]It is interesting to note the development of a scheme-like remedy for person trusts. Prior to 1970, it was believed that scheme-making was available only for charitable purpose trusts and could not be applied to person trusts. It was thought that the court was limited to ordering an equal distribution to all beneficiaries of a class where the creator failed to outline the means by which the class members were to be benefited. In *McPhail* v. *Doulton*, [1971] A.C. 424 (H.L.), however, the Court established that it could create a scheme even where the complete membership of a class of beneficiaries was impossible to ascertain. As long as there was a clear understanding of the creator's intentions, the Court had a framework that could verify that a scheme fit within the context of the creator's wishes. "[T]he court, if called on to execute the trust power, will do so in the manner best calculated to give effect to the settlor's or testator's intentions" (at 457).

In each of these examples, allowing the courts to apply scheme-making clearly assists in carrying out the intent of the creator of the trust and is far more equitable than simply allowing the trust to fail.

RECOMMENDATION 22

The remedy of scheme-making should be extended to non-charitable purpose trusts where the trust's purpose is clear but no mode is given or its mode is unclear.

B. IMPOSSIBLE, IMPRACTICABLE OR OBSOLETE MODE

1. Impossible or Impracticable Mode

Where the purpose and the mode of a charitable trust are certain, but the mode is impracticable or impossible, the mode can be varied through the remedy of *cy-près*. The court can vary the trust by substituting a new mode which is as close as possible to the one envisioned by the creator. Substitution is possible if it can be said that the creator intended to benefit charity generally, rather than a specific charitable purpose. The court is not at liberty to vary outside the general charitable intent. In *cy-près*, the finding of a general charitable intent allows the court to use the definition of charity as the frame of reference to establish the variation scheme. The remedy is workable because the definition of charity has a definite boundary.

Consider the following examples of charitable trusts with impossible or impracticable modes:

Example: *"the residue of my estate for the building of a hospital in my home town" but there already is a hospital which meets the needs of the community at the time the trust comes into effect*

Example: *"the residue of my estate to the Winnipeg Smallpox Clinic", but such a clinic never existed nor is likely to exist given that smallpox has been eradicated*

In the first example, the proposed mode is impracticable. In the second example, the mode is impossible. If the court can determine that a general charitable intent exists (for example, advancing health care and improving health generally), the remedy of *cy-près* can be applied. An alternate mode which is as close as possible to the original mode can be selected to fulfil the trust. For example, the court could direct that the trust be used for the maintenance of the hospital or for combatting another contagious disease.

The remedy of *cy-près* is not available to non-charitable purpose trusts and *The Trustee Act* provides for only limited variations. The Act provides for the variation of a trustee's administrative powers or the trust's administrative machinery, so long as the change would advance or further the purpose.[4] It is not clear whether this permits variation where the mode of a purpose trust is impossible or impracticable.

It seems clear that non-charitable purpose trusts with impossible or impracticable modes should not fail as an automatic rule of law. Rather, the appropriate policy of the law should be to

[4]*The Trustee Act*, C.C.S.M. c. T160, ss. 59(4) to 59(8).

allow the court to ascertain the intentions of the trust's creator and, where possible, fulfil them by assigning a new mode. Non-charitable purpose trusts should have a remedy like *cy-près* available to them. However, the *cy-près* doctrine itself cannot easily be applied to non-charitable purpose trusts. The doctrine requires that a general charitable intent be found; a corresponding requirement that a general non-charitable intent be found would be meaningless, since the court would have no recognized framework within which to find it. The boundaries of the legal definition of charity are known; the boundaries of "non-charity" are not. Therefore, a new remedy, based on some of the features of *cy-près*, must be devised.

The key to developing a variation remedy for non-charitable purpose trusts is to provide to the court a means of establishing a frame of reference within which alternative modes can be chosen. Only the intentions of the trust's creator, if ascertainable, can provide this framework. For some trusts, the creator's purpose will be narrow and variation will not be possible, as any alteration would be outside the creator's intentions. In other cases, a court will be able to conclude that the creator intended to benefit a clear and identifiable non-charitable purpose and that a variation of the mode would still be within the ambit of the creator's intentions; a variation should then be allowed.

Much will depend on the creator's intentions and the way in which they are expressed. Consider the following examples:

Example: *"given the artistic, cultural and historical significance of quilting, my home is to be held in trust for the benefit of the Arlington Park Quilting Club", but the Club has been disbanded*

Example: *"my home to be held in trust for the benefit of the Arlington Park Quilting Club", but the Club has been disbanded*

In the first example, the mode is impossible, but the purpose (promoting the artistic, cultural and historic elements of quilting) is clear and identifiable. The courts should be able to give effect to the creator's intentions by varying the mode; for example, the court could direct that the home be used as a quilting museum. In the second example, in the absence of some other evidence, it is the purpose of the trust itself which is impossible, not the mode. Varying the trust would in no way advance the creator's intentions (benefiting that particular club). It would be more appropriate for this trust to fail and for its proceeds to benefit the creator or his or her heirs.[5]

Example: *"the residue of my estate to benefit Winnipeg's professional sports teams by being used to construct a 50,000 seat domed stadium"; when the trust comes into being, the stadium has already been built*

Example: *"the residue of my estate to construct a 50,000 seat domed stadium in Winnipeg" but, when the trust comes into being, the stadium has already been built*

Again, the first trust shows a clear intention (supporting the professional teams) which is capable of being fulfilled through variation of the trust's impracticable mode; for example, the trust could be applied to the maintenance of the stadium. The second trust indicates a narrower purpose (constructing a stadium) which is itself impracticable. Any application of the trust to an activity other than building the stadium would be an alteration of the purpose, that is, an alteration of the creator's intentions. Variation should not be possible.[6]

[5]When a trust fails and there are no directions as to where the assets are to be applied, the funds revert back to the creator or his or her estate. The creator or the estate are said to be the beneficiaries of a resulting trust.

[6]If, instead, the problem had been that the trust funds were only sufficient to construct a smaller stadium, variation may be possible in such circumstances if the court could determine that seating capacity was not essential to fulfilling the purpose.

RECOMMENDATION 23

Where the mode of a non-charitable purpose trust is impossible or impracticable to fulfil, either initially or subsequently, a court should be empowered to consent to a variation of the mode, provided that it furthers the perceivable purpose of the trust.

2. Obsolete Mode

It is also possible that a mode would be or become obsolete without necessarily being or becoming impossible or impracticable to fulfil.[7] In Manitoba, obsolescence has not been recognized as a ground for varying the mode of a charitable trust.[8] However, there appears to be no reason not to allow the variation of obsolete modes. It is surely better to assist the trust's creator by varying the obsolete mode and giving effect to a clear purpose. Again, the variation of mode must remain within the context of the intended purpose.

Example: "the residue of my estate to protect school children by constructing nuclear bomb shelters"

Example: "the residue of my estate to construct nuclear bomb shelters"

Assuming that the construction of nuclear bomb shelters can be considered to be obsolete, the first example (protecting school children) could still be fulfilled by replacing the obsolete mode and providing protection in another area (such as, more crossing guards). The trust purpose in the second example (constructing bomb shelters) might now be considered to be obsolete and, without further understanding of the intentions of the creator, the trust should fail.

RECOMMENDATION 24

Where the mode of a non-charitable purpose trust is obsolete, either initially or subsequently, a court should be empowered to consent to a variation of the mode provided that it furthers the perceivable purpose of the trust.

Clearly, subtle changes in the wording of a trust can make a tremendous difference. While this might seem unfair to creators who do not articulate their intentions well, there must be a limit to the extent to which a court can change a trust; that limit should be found in the basic test of certainty: the trustee (or the court) must be able to understand the instructions of the creator.

C. UNCLEAR PURPOSE

In light of the foregoing comments on the importance of certainty of purpose, it may seem surprising that even charitable trusts which apparently lack a clearly defined purpose can be

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[7]There is often a fine line between whether a mode is impracticable or obsolete.

[8]Other jurisdictions, through legislation, have provided the court with the power to apply *cy-près* to obsolete modes. See for example, *Charities Act, 1960* (U.K.), 8 & 9 Eliz. 2, c. 58, s. 13(1). The variation provisions in our *Trustee Act* allow for the variation of a specified purpose in a purpose trust if the variation would advance or further that purpose. It could be argued that updating an obsolete trust meets these criteria; if so, the obsolesence could thus be overcome and varied. However, the provisions are relatively new and there are no cases on this issue.

saved by the courts. The classic example is a trust for "the residue of my estate for charitable purposes". Because a general charitable intent is manifested, the courts consider that the purpose is not, in fact, unclear. The general charitable intent is enough to indicate a broad but definable framework for scheme-making.[9] The framework is determined by the definition of charity. Thus, the courts can prescribe a mode within this framework.

On the other hand, as we have indicated previously, non-charitable purposes lack a definable boundary. The possibilities are endless and, unless the creator gives sufficient information as to the purposes to be fulfilled, there is no framework within which the creator's intentions can be found. Consequently, where both the purpose and the mode of a non-charitable purpose trust are uncertain (such as "the residue of my estate for non-charitable purposes"), a scheme could not and should not help the trust.

RECOMMENDATION 25

Scheme-making should not be available to save non-charitable purpose trusts having unclear purposes.

[9]It would not be necessary for the court to apply *cy-près* as there is no variation of the mode occurring, there being no mode in the first place.

CHAPTER 5

TRUSTS WITH MULTIPLE PURPOSES

A trust can be established to further more than one purpose. The purposes could be exclusively charitable, exclusively non-charitable or a mix of charitable and non-charitable. Where a multi-purpose trust contains one or more purposes which are invalid, a problem arises: unless a statute provides to the contrary, the invalidity of part of the trust can cause the entire trust to fail.[1] Furthermore, a problem arises even where all of the purposes are valid: in what proportions is the trustee to divide the trust's assets among the various purposes?

The recommendations which we have made earlier in this Report should greatly reduce the circumstances in which trusts with exclusively non-charitable purposes will be found to be invalid. As well, the mere recognition and validation of non-charitable purposes will greatly decrease the failure of mixed purpose trusts. It is only where the non-charitable purpose is uncertain or contrary to public policy that a problem might still arise.

The Trustee Act deals with mixed purpose trusts in which charitable and non-charitable purposes are joined conjunctively or disjunctively. Where the non-charitable purpose is invalid, that portion is severed from the trust and the assets are applied solely to the charitable purpose.[2] Where the non-charitable purpose is valid but division of the property among the purposes is not established by the instrument, the Act gives the trustee the power to exercise his or her own discretion to divide the property among the purposes.[3] The following examples demonstrate the effect of these provisions:

Example: *"the residue of my estate in trust for charitable or non-charitable purposes"*

Example: *"the residue of my estate in trust for the XYZ scholarship fund, the upkeep of the local church and the upkeep of the family house and gardens"*

As a result of *The Trustee Act*, the entire residue in the first example would be applied to charitable purposes, as the non-charitable purpose is invalid for uncertainty. In the second example, all of the listed purposes are valid (assuming that the non-charitable purpose is enforceable) and the Act allows the trustee to divide the trust fund among the purposes as he or she sees fit.

However, the Act does not offer a remedy to three other situations.[4] The first occurs where two or more valid non-charitable trusts are joined conjunctively or disjunctively but no division of property among the purposes is established:

Example: *"the residue of my estate in trust for the Arlington Park Quilting Club and the building of a monument for Pat Smith"*

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[1]This will rarely happen to trusts with exclusively charitable purposes, given the ease with which courts can cure their defects.

[2]*The Trustee Act*, C.C.S.M. c. T160, s. 91(1).

[3]*The Trustee Act*, C.C.S.M. c. T160, s. 91(2).

[4]For the purposes of the examples, we will assume that the non-charitable purpose trusts are enforceable.

It seems clear that the existing policy in *The Trustee Act* should be extended: in the absence of a direction from the trust's creator, the trustee should have the power to exercise his or her discretion to divide the property among the purposes.

The second problem occurs where two or more non-charitable purposes are joined conjunctively or disjunctively and one or more of the purposes are invalid:

> *Example: "the residue of my estate in trust for the Arlington Park Quilting Club, the building of a monument to Pat Smith and financing armed uprisings"*

In this situation, the technique used in *The Trustee Act* of severing the invalid portion and applying the trust solely to the valid portion would appear to be an appropriate solution. The invalidity of the trust for armed uprisings (void as contrary to public policy) should be severed and should not affect the validity of the other two purposes.

Finally, *The Trustee Act* does not deal with the situation where the trust embodies within a single word or phrase both charitable and non-charitable purposes:

> *Example: "a trust for worthy purposes", "a trust for benevolent purposes", "a trust for beneficial purposes"*

It is impossible to say whether the creator of the trust intended charitable or non-charitable purposes. If we accept the essential validity of both charitable and non-charitable trusts, then it would be absurd to invalidate such a trust just because it was not possible to tell whether the trust is one or the other. The non-charitable element in such trusts is uncertain and, because there is no indication of what non-charitable purposes the creator might believe to be worthy or benevolent, is incapable of being saved. The charitable element, however, is certain, for charity is definable; the court has a framework within which choices can be made. Given the public benefit of the charitable element, such trusts should operate solely for the benefit of the charitable purposes to the exclusion of the non-charitable purposes.

For the sake of consistency, we also believe that the reforms which we have proposed for dealing with severing and apportionment of non-charitable trusts should also be applied to trusts with exclusively charitable purposes. *The Trustee Act* does not deal with the severance of an invalid charitable trust (admittedly, an unlikely event) or the apportionment between two or more valid charitable trusts (a more likely event) and the case law which does exist is archaic and complex. Consistency in this area of the law will avoid unnecessary litigation to determine whether a purpose is charitable or non-charitable. The application of severing and the rules respecting apportionment will be the same regardless of the nature of the purposes.

RECOMMENDATION 26

Where a trust contains a valid purpose that is associated with an invalid purpose, the invalid purpose should be severed and the trust applied for the benefit of the valid purpose or purposes.

RECOMMENDATION 27

Where a trust contains two or more purposes and the settlor or testator does not divide the property among the purposes, the trustee shall divide the property as he or she sees fit.

CHAPTER 6

THE TRUSTEE AMENDMENT ACT (ANNOTATED)

In order to give effect to the recommendations set out in this Report, it will be necessary to amend *The Trustee Act*. To facilitate this and to better explain our proposals, we have prepared a draft statute. It is set out below and is then reproduced in Appendix A without commentary.

RECOMMENDATION 28

The recommendations contained in this Report should be implemented by amending The Trustee Act in a manner similar to that set out in Appendix A.

Draft Act	Annotations
HER MAJESTY, by and with the advice and consent of the Legislative Assembly of Manitoba, enacts as follows:	
C.C.S.M. c. T160 amended *1 The Trustee Act is amended by this Act.*	
2 Section 1 is amended by adding the following definition in alphabetical order within the section: "delegate" means a person who is granted the power under subsection 93(1) to appoint an enforcer;	*This section adds the term "delegate" to the definitions section of The Trustee Act.* *A person who creates a non-charitable purpose trust has a power to select the enforcer of that trust. This power to appoint enforcers can be given to another person, the delegate, in much the same way that the power to appoint trustees can be vested in another.*

3(1) Clause 5(1)(c) is amended by striking out "trustee." *and substituting* "trustee; or".

3(2) The following is added after clause 5(1)(c):

(d) an enforcer of a non-charitable purpose trust.

At present, s. 5(1) reads as follows:

5(1) An order under this Act for the appointment of a new trustee, or concerning any land or personal estate subject to a trust, may be made by the court upon the application of

(a) any person creating or intending to create a trust; or

(b) any person beneficially interested in a trust, whether under disability or not; or

(c) any person duly appointed a trustee.

The amendment gives an enforcer the same right to seek an order from the court for the appointment of a new trustee or an order concerning the assets of the trust that a beneficiary of a trust currently has. This is consistent with the philosophy that, with respect to enforcement, an enforcer should have all the rights of a beneficiary of a person trust.

4(1) Section 86 is renumbered as subsection 86(1).

4(2) The following is added after subsection 86(1):

Enforcer is interested person
86(2) For the purpose of proceedings and practice upon the passing of accounts under this section, an enforcer of a non-charitable purpose trust is deemed to be a person interested in that trust.

5 The following is added after subsection 87(11):

Enforcer included
87(12) In this section, "person interested in the trust estate" includes an enforcer of a non-charitable purpose trust.

Sections 86 and 87 of The Trustee Act deal with passing the accounts of a trust. The amendments ensure that the enforcer will receive notice of any passing of accounts sought by the trustee of a non-charitable purpose trust. They also allow enforcers to seek an order for the passing of accounts and to receive notice of an application by other interested persons for an order for the passing of accounts. In addition, enforcers will be bound by an order which approves the accounts. The relevant sections read as follows:

87(2) The persons interested in the trust estate or some or one of them may, from time to time, but not oftener than once in each year, apply to a judge in chambers upon motion, without any action being instituted or preliminary proceedings taken, for an order that the trustee do bring in and pass his accounts in connection with the trust estate.

87(3) Notice of the motion shall be given as provided in subsection (4) upon all ***persons interested in the trust estate*** *other than the applicant or applicants.*

87(4) It is sufficient notice to all ***persons interested in the trust estate*** *if the notice of motion is served upon such persons, and in such manner, as a judge in chambers may direct, at least 10 days before the day named for hearing the application.*

87(11) The order on the taking and passing of accounts is binding upon all ***persons interested in the trust estate*** *and upon all persons claiming under them.*

6 Subsections 90(1), (4) and (5) are each amended by striking out "a trustee" *and substituting* "an enforcer of a non-charitable purpose trust, a trustee".

Section 90 of The Trustee Act is concerned with allowances to trustees, personal representatives and guardians. The amendment will give the court jurisdiction to compensate enforcers for costs incurred in enforcing the trust and to allow remuneration for the care, pain, trouble and time expended in fulfilling the position. The relevant sections currently read as follows:

90(1) A trustee, guardian, or personal representative is entitled to such fair and reasonable allowance for his care, pains, and trouble, and his time expended in and about the estate, as may from time to time be allowed by a judge of the court or by any master or referee to whom the matter may be referred.

90(4) Where a barrister or solicitor is a trustee, guardian, or personal representative, and has rendered necessary professional services to the estate, regard may be had in making the allowance to such circumstance; and the allowance shall be increased by such amount as may be deemed fair and reasonable in respect of the services.

90(5) Any agreement, instrument or document executed by a testator or any person on his behalf fixing the amount of compensation or allowance that may be paid to a trustee, guardian or personal representative with respect to the

administration of the estate of the testator, is not valid unless it is approved by a judge.

7 The heading preceding section 91 and section 91 are repealed and the following is substituted:

Section 91 of The Trustee Act addresses problems arising when a charitable purpose is linked conjunctively or disjunctively with either a valid or invalid non-charitable purpose. The proposed amendment broadens the scope of the section.

MULTI-PURPOSE TRUSTS

Meaning of "purpose"
91(1) In this section, "purpose" includes charitable purpose and non-charitable purpose.

The operation of section 91 will not be restricted by a requirement that a purpose be linked with another purpose by the word "and" or "or". The section will recognize that two purposes may be linked by a single word or phrase. For example, a trust "for beneficial purposes" connotes both charitable and non-charitable purposes in a single word.

Associated purposes
91(2) Purposes are associated within the meaning of this section when

(a) they are linked conjunctively or disjunctively; or

(b) a single word or a phrase connotes both a charitable and a non-charitable purpose.

Similarly, the section will not be restricted to situations where charitable purpose trusts are linked with non-charitable purpose trusts; it will apply to any purpose trust linked with any other purpose trust, whether the purpose is charitable or non-charitable.

Invalid trusts to be severed
91(3) Where a settlor or a testator disposes of property by gift or in trust for a valid purpose associated with a void purpose, the gift or trust does not fail and operates solely for the benefit of the valid purpose.

This subsection allows a court to discard an invalid purpose (charitable or non-charitable) while allowing the trust to be applied to the valid purposes. In this way, the entire trust will not fail. Of course, given the extensive reforms proposed for the validation of non-charitable purpose trusts, there will generally be fewer cases where invalid purposes will exist.

When trustee to divide property
91(4) Where a settlor or a testator disposes of property by gift or in trust for a valid purpose associated with another valid purpose and where the settlor or testator does not divide the property between the purposes, the trustee shall divide it as the trustee sees fit.

Whenever a trust is established to further more than one purpose and the creator of the trust does not specify the manner in which the assets of the trust are to be divided among the purposes, the discretion of the trustee will be relied upon. The same rule will apply whether the purposes are charitable or non-charitable.

8 The following is added after section 91:

NON-CHARITABLE PURPOSE TRUSTS

ENFORCEMENT OF NON-CHARITABLE PURPOSE TRUSTS

Enforcement and validity

92 A non-charitable purpose trust is not invalid by reason only that it has no person occupying the position of enforcer created by this Act.

Non-charitable purpose trusts are not inherently invalid, though enforcement is still an essential requirement. Thus, the temporary absence of a person in the position of enforcer should not invalidate the trust, so long as there is a mechanism to fill vacancies when they occur. This addition to The Trustee Act ensures continued enforcement and therefore continued validity of the trust.

Creator may appoint

93(1) Before a non-charitable purpose trust comes into effect, either its creator or a delegate appointed in writing by the creator may, in writing, appoint a person or a succession of persons as enforcer of the trust.

The creator of the trust may select the enforcer prior to the trust coming into existence or may give up that power to a delegate. The creator (or the delegate) may name a single enforcer or may name successors to take over the position in the event the first person named is unable or unwilling to act. The appointment must be made in writing. If the creator (or the delegate) fails to appoint an enforcer before the trust comes into effect, then a vacancy will exist and s. 93(2) will apply.

Trustee to seek enforcer

93(2) Where a non-charitable purpose trust comes into effect and initially or subsequently has no enforcer, its trustee shall forthwith seek the appointment of an enforcer by

(a) a settlor of the trust, if living;

(b) a delegate of the trust; or

(c) a court.

This section provides the mechanism to fill vacancies in the office of the enforcer. Upon a vacancy arising, the trustee is obliged to take steps to obtain a replacement. The trustee does this by approaching the trust's creator (if he or she is alive) or the delegate named for the purpose by the creator or by applying to the Court of Queen's Bench. Thus, the trustee is given three possible sources from which to obtain an enforcer appointment.

Settlor may be enforcer
94(1) A settlor of a non-charitable purpose trust may be an enforcer of that trust.

There is no reason why a settlor should not be the enforcer of his or her own trust. The settlor may appoint himself or herself or may be appointed by a delegate or a court.

Trustee not to be enforcer
94(2) The trustee of a non-charitable purpose trust shall not be an enforcer of that trust.

A person cannot be both the trustee and the enforcer of the same trust. Since the purpose of the enforcer position is to monitor the trustee, a conflict of interest would arise.

Duties and powers of enforcer
95 An enforcer of a non-charitable purpose trust shall monitor the actions of its trustee and shall enforce the provisions of the trust using due diligence and care, and for that purpose the enforcer has all the remedial and enforcement rights and powers of a beneficiary of a trust.

In issues involving enforcement, the enforcer is akin to a beneficiary of a person trust. As such, the actions that a beneficiary would be expected to take to ensure that his or her interests are being met are the actions that the enforcer should take to enforce the non-charitable purpose trust. It follows that the enforcer would have the same rights and remedies that a beneficiary would have in a person trust.

Trustee to give notice
96(1) When a non-charitable purpose trust comes into effect, its trustee shall forthwith give written notice of appointment to any person appointed as enforcer under subsection 93(1).

It is possible for a non-charitable purpose trust to come into existence without the intended enforcer being aware of his or her appointment. Effective and meaningful notice is therefore vital. Since the trustee is the only person who can be guaranteed to know of the commencement of the trust and the identity of the enforcer, the obligation to give notice is placed on the trustee.

Notice to successive enforcer
96(2) Where a non-charitable purpose trust has a vacancy in the position of enforcer, its trustee shall forthwith give written notice of appointment to any person appointed as a successive enforcer under subsection 93(1).

A vacancy in the position of enforcer may be filled automatically where the creator has named a successor enforcer (this would have been done prior to the coming into force of the trust). In that case, the trustee may be the only person aware of the automatic accession of the new enforcer and therefore an obligation is placed on the trustee to notify that person of his or her new responsibilities. This notice is crucial, since the successor enforcer's appointment is effective only after the notice is received.

Notice to appointed enforcer
96(3) Where the trustee of a non-charitable purpose trust seeks the appointment of an enforcer under clauses 93(2)(a) or (b), the trustee shall forthwith give written notice of the appointment to the person so appointed.

Where no successor was previously named, the trustee has an obligation to seek the appointment of a new enforcer from the trust's creator, a delegate or the court (s. 93(2)). Where the appointment is sought from the court, we can rely on the court to ensure that adequate notice is given to the person it selects. However, when the appointment is sought from the creator or the delegate, the trustee is obliged to give notice to the person so selected.

Exception
96(4) Where a settlor of a non-charitable purpose trust appoints himself or herself as an enforcer, the trustee need not give notice under this section to that settlor unless the settlor is a successive enforcer.

A settlor who appoints himself or herself would not require notice since he or she would obviously be aware of the appointment. The only circumstance that would require that a settlor receive notice of his or her own appointment is where he or she is a successor enforcer. Notice in that case would be necessary as there is no guarantee that a settlor would be aware of the death, resignation or incapacity of the previous enforcer.

Effective date of appointment
97 The appointment of an enforcer of a non-charitable purpose trust becomes effective on the date when,

(a) in the case of a settlor who appoints himself or herself as an enforcer under subsection 93(1), the trust takes effect;

(b) in the case of a settlor who appoints himself or herself as an enforcer under clause 93(2)(a), the appointment is made;

(c) in the case of an appointment under clause 93(2)(c), the court orders the appointment;

(d) in all other cases, the appointed person receives written notice of the appointment as required by section 96.

Generally, the effective date of appointment as enforcer is when notice of appointment is received. The position encompasses significant responsibilities and duties which should not be imposed without notice to the intended enforcer.

Where a settlor appoints himself or herself, the appointment is effective when the trust comes into existence since the settlor does not require notice. If the settlor appoints himself or herself after the trust comes into effect (under s. 93(2)(a)), the appointment also takes effect immediately for the same reason. Where the settlor becomes the enforcer either by an appointment by a delegate or because he or she is named as a successor enforcer, the appointment is effective only after notice is received.

Where the enforcer appointment is made by the court, it will become effective when ordered. It is unlikely that a court would make an appointment without first confirming that a person is willing to accept the position.

When vacated
98 The position of enforcer of a non-charitable purpose trust is vacated when the enforcer dies, resigns or is removed by a court.

A vacancy in the position of enforcer arises upon the death or resignation of the enforcer or upon his or her removal by a court. Factors such as incapacity or refusal to act will not result in an automatic vacation of the office; rather, they will be grounds for an application to court to remove the enforcer.

Resignation by enforcer
99(1) An enforcer of a non-charitable purpose trust may resign from that position by giving a written resignation to the trustee of the trust.

An enforcer may resign the position at any time. The resignation must be in writing and must be given to the trustee. These minimal requirements ensure that the trustee becomes aware of a vacancy in the position, so that he or she can give notice to a successor enforcer or seek the appointment of a new enforcer.

Effective date
99(2) The resignation is effective on the date specified in it or the date it is received by the trustee, whichever is later.

Unless the enforcer specifies a later date, a resignation will take effect upon its receipt by the trustee. Until the effective date occurs, the person continues to be the enforcer with all the responsibilities and duties that accompany the position.

Removal of enforcer
100 A court may order the removal of an enforcer of a non-charitable purpose trust from that position where the enforcer can not act in that capacity or contravenes section 95.

Only the court can remove an enforcer. It may do so if an enforcer is incapable of carrying out the duties of the position or is not carrying out those duties with due diligence and care.

Application for order
101(1) An application for an order under clause 93(2)(c) or section 100 may be brought by

(a) the trustee of the trust;

(b) a settlor or a delegate of the trust, if living;

(c) a person who has a residuary interest in the trust;

Virtually any person with an identifiable interest in the trust may bring an application to court to seek the removal of an enforcer. As well, the court is given a discretion to accept applications from others whose interest in the trust the legislation may not have foreseen.

This subsection also empowers persons other than the trustee to seek the filling of a vacancy in the position of enforcer. Though the trustee is obliged to seek the

(d) a person who derives a direct or tangible benefit from the trust; or

(e) such other person as a court may allow.

appointment of an enforcer when a vacancy is known, allowing others to do so as well creates a safeguard in the event the trustee shirks his or her duty.

Notice
101(2) A person who applies for an order under clause 93(2)(c) shall give notice of the application to

(a) the trustee of the trust;

(b) the settlor or the delegate of the trust, if living;

(c) any person who has a residuary interest in the trust; and

(d) such other person as a court may direct.

Notice of an application to court to name a new enforcer should be given to all persons who are interested in the trust. This includes the trustee, the settlor of the trust (or a delegate) and any residuary beneficiary. However, a requirement that notice be given to every person who derives a direct or tangible benefit from the trust would be asking too much. This group could be extremely large and impossible to determine completely. Instead, the court is given a discretion to order that notice be given to persons who fall into this category. Where these persons are easily identifiable, the court might direct that notice be given to them directly; where they are not easily identifiable, it might consider requiring the placement of advertisements in newspapers.

Notice also to enforcer
101(3) A person who applies for an order under section 100 shall give notice of the application as provided in subsection (2) and to the enforcer of the trust.

Similarly, notice of an application to court to remove an enforcer should be given to all persons who are interested in the trust (and to any additional persons whom the court may name, such as those deriving a direct or tangible benefit from the trust). This subsection ensures that the enforcer whose removal is being sought is also given notice of the application.

Statute prevails over instrument
102 Sections 92 to 101 govern every non-charitable purpose trust notwithstanding any contrary intention expressed in the instrument, if any, creating the trust.

Normally, the wishes of a creator prevail over the statute. However, the sections establishing the enforcement mechanism may not be overridden by directions in the trust document. Even a small alteration of the scheme by a creator could hamper the enforcement of the trust and jeopardize its validity.

CERTAINTY OF NON-CHARITABLE PURPOSE TRUSTS

Court may provide certain method
103(1) Where a non-charitable purpose trust has a purpose that is certain and the trust

(a) does not state a method to achieve that purpose, a court may order the use of the method that, in its opinion, fulfils the intention of the creator of the trust;

(b) states an unclear method to achieve that purpose, a court may order any clarification of the method that, in its opinion, fulfils the intention of the creator of the trust; or

(c) states a method to achieve that purpose and that method is or becomes impossible, impracticable or obsolete, a court may revoke that method and order the use of another method to achieve that purpose.

A purpose trust must express with certainty both a purpose and a method of achieving that purpose. This section allows a court to correct problems with the certainty of the trust's method.

Where the purpose is clearly stated but the method is not stated, the court may supply a method that will fulfil the intentions of the creator. If the purpose is clearly stated but the method is unclear, the court can provide any clarification that might be required; this would include tracing a named institution to its present form or correcting an error in the naming of an institution. Finally, if the purpose is clearly stated but the method is or becomes impossible, impracticable or obsolete, the court can substitute another method of achieving the trust's purpose.

The court cannot vary or clarify an unclear purpose.

Method need not be similar
103(2) A court acting under clause (1)(c) is not obliged to substitute a method that is similar to the original method.

Subsection 103(1) gives the court the power to provide an alternative method for non-charitable purpose trusts in which the methods are or become impossible, impracticable or obsolete. In doing so, the court must select a method which is consistent with the stated purpose of the settlor. However, it would be unduly restrictive to require the court to choose a method similar to the one which has been impugned; the purpose set out by the trust's creator provides an adequate framework for the court's deliberations. Accordingly, this subsection expressly states that the court is under no such obligation.

Limitation
103(3) A court may not make an order under this section without the consent of any settlor of the trust, if living.

No one knows better than the settlor whether an alternative method will fulfil the purpose he or she set out when establishing the trust. Accordingly, if the settlor is alive at the time of a proposed change to the trust's method, his or her consent to the change is required.

Coming into force
9 This Act comes into force on the day it receives royal assent.

CHAPTER 7

SUMMARY OF RECOMMENDATIONS

The following is a summary of the recommendations contained in this Report.

1. The law should be reformed so that the technical barriers to the validity of non-charitable purpose trusts are overcome. (p. 14)

2. The law should be reformed to create a position of enforcer within all non-charitable purpose trusts. (p. 20)

3. The absence of a person occupying the position of the enforcer of a non-charitable purpose trust should not in itself invalidate the trust. (p. 20)

4. The enforcer should monitor and enforce a non-charitable purpose trust with the same diligence and care of a person who had a beneficial interest in the trust. Accordingly, the trustee should have all the remedial and enforcement rights and powers of a beneficiary of a trust that are required to carry out these duties. (p. 21)

5. The enforcer of a non-charitable purpose trust should be a person or persons appointed by:

   a) the settlor or testator, or

   b) the person named by the settlor or testator for the purpose of appointing enforcers (the delegate). (p. 22)

6. The settlor, or the delegate, should be permitted to appoint a succession of enforcers. (p. 22)

7. The trustee of a non-charitable purpose trust should not also be the enforcer of the trust. (p. 22)

8. Where a trustee of a non-charitable purpose trust has reason to believe that the trust has no enforcer, the trustee should be obliged to seek to have a new enforcer appointed by:

   a) a settlor of the trust, if living;

   b) a person named by the settlor or testator for the purpose of appointing enforcers; or

   c) the Court of Queen's Bench. (p. 23)

9. Upon a non-charitable purpose trust coming into existence, its trustee should be obliged to advise the enforcer of that trust of his or her appointment to the position. (p. 23)

10. Where a non-charitable purpose trust has a vacancy in the position of enforcer, the trustee should be obliged to advise a successive enforcer, if one has been named, of his or her appointment. (p. 24)

11. Where a non-charitable purpose trust has a vacancy in the position of enforcer and the trustee seeks the appointment of an enforcer, the trustee should give written notice of the appointment when it is made to the person so appointed. (p. 24)

12. The appointment of an enforcer of a non-charitable purpose trust should become effective on the date when,

    a) in the case of an appointment by the court, the court orders the appointment;

    b) in the case of a settlor who names himself or herself as enforcer, the trust takes effect;

    c) in all other cases, the appointed person receives written notice of the appointment. (p. 24)

13. Where an enforcer cannot act or is not fulfilling the duties of the position, the Court of Queen's Bench should have the power to remove the enforcer upon application from:

    a) the trustee of the trust;

    b) a settlor or a delegate of the trust, if living;

    c) a person who has a residuary interest in the trust;

    d) a person who derives a direct or tangible benefit from the trust; or

    e) such other person as a court may allow. (p. 25)

14. An application for an order from the court to appoint an enforcer where a vacancy exists in the position may be brought by:

    a) the trustee of the trust;

    b) a settlor or a delegate of the trust, if living;

    c) a person who has a residuary interest in the trust;

    d) a person who derives a direct or tangible benefit from the trust; or

    e) such other person as a court may allow. (p. 25)

15. Notice of an application for either an order for the appointment of an enforcer by the court or an order for the removal of an enforcer should be given to:

    a) the trustee of the trust;

    b) the settlor or the delegate of the trust, if living;

    c) any person who has a residuary interest in the trust; and

    d) such other persons as a court may direct;

    and in the case of the removal of an enforcer, notice should also be given to the enforcer. (p. 26)

16. An enforcer of a non-charitable purpose trust may resign at any time by giving a written resignation to the trustee of the trust. (p. 26)

17. The resignation should be effective on the date specified in the resignation or on the date it is received by the trustee, whichever is the later. (p. 26)

18. The recommended provisions pertaining to the enforcement of non-charitable purpose trusts should govern all such trusts notwithstanding any contrary intention expressed by the creator of the trust. (p. 27)

19. Section 5(1) of *The Trustee Act* should be amended to indicate that, in the case of a non-charitable purpose trust, the enforcer can apply for orders pertaining to the appointment of a new trustee, or concerning any land or personal estate subject to the trust. (p. 27)

20. Non-charitable purpose trusts should be subject to the same rules pertaining to the passing of accounts as other trusts. (p. 28)

21. The enforcer of a non-charitable purpose trust should be able to seek fair and reasonable remuneration for his or her care, pain, and trouble and the time expended in enforcing the trust. (p. 28)

22. The remedy of scheme-making should be extended to non-charitable purpose trusts where the trust's purpose is clear but no mode is given or its mode is unclear. (p. 31)

23. Where the mode of a non-charitable purpose trust is impossible or impracticable to fulfil, either initially or subsequently, a court should be empowered to consent to a variation of the mode, provided that it furthers the perceivable purpose of the trust. (p. 33)

24. Where the mode of a non-charitable purpose trust is obsolete, either initially or subsequently, a court should be empowered to consent to a variation of the mode provided that it furthers the perceivable purpose of the trust. (p. 33)

25. Scheme-making should not be available to save non-charitable purpose trusts having unclear purposes. (p. 34)

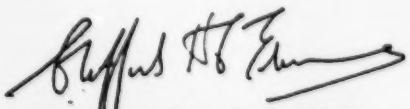
26. Where a trust contains a valid purpose that is associated with an invalid purpose, the invalid purpose should be severed and the trust applied for the benefit of the valid purpose or purposes. (p. 36)

27. Where a trust contains two or more purposes and the settlor or testator does not divide the property among the purposes, the trustee shall divide the property as he or she sees fit. (p. 36)

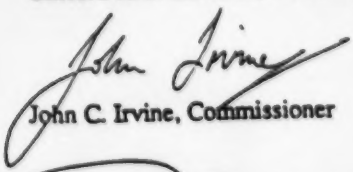
28. The recommendations contained in this Report should be implemented by amending *The Trustee Act* in a manner similar to that set out in Appendix A. (p. 37)

These recommendations should be read in conjunction with our draft amendments to *The Trustee Act* set out in Appendix A and explained in Chapter 6.

This is a Report pursuant to section 15 of *The Law Reform Commission Act*, C.C.S.M. c. L95, signed this 21st day of September, 1992.



Clifford H.C. Edwards, President



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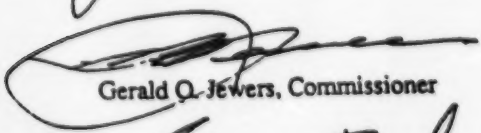
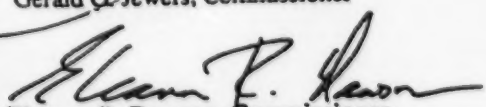


Gerald O. Jewers, Commissioner



Eleanor R. Dawson, Commissioner

Pearl K. McGonigal, Commissioner

APPENDIX A

THE TRUSTEE AMENDMENT ACT

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of Manitoba, enacts as follows:

C.C.S.M. c. T160 amended
1 The Trustee Act is amended by this Act.

2 Section 1 is amended by adding the following definition in alphabetical order within the section:

"delegate" means a person who is granted the power under subsection 93(1) to appoint an enforcer;

3(1) Clause 5(1)(c) is amended by striking out "trustee." *and substituting* "trustee; or".

3(2) The following is added after clause 5(1)(c):

(d) an enforcer of a non-charitable purpose trust.

4(1) Section 86 is renumbered as subsection 86(1).

4(2) The following is added after subsection 86(1):

Enforcer is interested person
86(2) For the purpose of proceedings and practice upon the passing of accounts under this section, an enforcer of a non-charitable purpose trust is deemed to be a person interested in that trust.

5 The following is added after subsection 87(11):

Enforcer included
87(12) In this section, "person interested in the trust estate" includes an enforcer of a non-charitable purpose trust.

6 Subsections 90(1), (4) and (5) are each amended by striking out "a trustee" *and substituting* "an enforcer of a non-charitable purpose trust, a trustee".

7 The heading preceding section 91 and section 91 are repealed and the following is substituted:

MULTI-PURPOSE TRUSTS

Meaning of "purpose"
91(1) In this section, "purpose" includes charitable purpose and non-charitable purpose.

Associated purposes
91(2) Purposes are associated within the meaning of this section when

(a) they are linked conjunctively or disjunctively; or

(b) a single word or a phrase connotes both a charitable and a non-charitable purpose.

Invalid trusts to be severed
91(3) Where a settlor or a testator disposes of property by gift or in trust for a valid purpose associated with a void purpose, the gift or trust does not fail and operates solely for the benefit of the valid purpose.

When trustee to divide property
91(4) Where a settlor or a testator disposes of property by gift or in trust for a valid purpose associated with another valid purpose and where the settlor or testator does not divide the property between the purposes, the trustee shall divide it as the trustee sees fit.

8 The following is added after section 91:

NON-CHARITABLE PURPOSE TRUSTS

ENFORCEMENT OF NON-CHARITABLE PURPOSE TRUSTS

Enforcement and validity
92 A non-charitable purpose trust is not invalid by reason only that it has no person occupying the position of enforcer created by this Act.

Creator may appoint
93(1) Before a non-charitable purpose trust comes into effect, either its creator or a delegate appointed in writing by the creator may, in writing, appoint a person or a succession of persons as enforcer of the trust.

Trustee to seek enforcer
93(2) Where a non-charitable purpose trust comes into effect and initially or subsequently has no enforcer, its trustee shall forthwith seek the appointment of an enforcer by

(a) a settlor of the trust, if living;

(b) a delegate of the trust; or

(c) a court.

Settlor may be enforcer
94(1) A settlor of a non-charitable purpose trust may be an enforcer of that trust.

Trustee not to be enforcer
94(2) The trustee of a non-charitable purpose trust shall not be an enforcer of that trust.

Duties and powers of enforcer
95 An enforcer of a non-charitable purpose trust shall monitor the actions of its trustee and shall enforce the provisions of the trust using due diligence and care, and for that purpose the enforcer has all the remedial and enforcement rights and powers of a beneficiary of a trust.

Trustee to give notice
96(1) When a non-charitable purpose trust comes into effect, its trustee shall forthwith give written notice of appointment to any person appointed as enforcer under subsection 93(1).

Notice to successive enforcer
96(2) Where a non-charitable purpose trust has a vacancy in the position of enforcer, its trustee shall forthwith give written notice of appointment to any person appointed as a successive enforcer under subsection 93(1).

Notice to appointed enforcer
96(3) Where the trustee of a non-charitable purpose trust seeks the appointment of an enforcer under clauses 93(2)(a) or (b), the trustee shall forthwith give written notice of the appointment to the person so appointed.

Exception
96(4) Where a settlor of a non-charitable purpose trust appoints himself or herself as an enforcer, the trustee need not give notice under this section to that settlor unless the settlor is a successive enforcer.

Effective date of appointment
97 The appointment of an enforcer of a non-charitable purpose trust becomes effective on the date when,

(a) in the case of a settlor who appoints himself or herself as an enforcer under subsection 93(1), the trust takes effect;

(b) in the case of a settlor who appoints himself or herself as an enforcer under clause 93(2)(a), the appointment is made;

(c) in the case of an appointment under clause 93(2)(c), the court orders the appointment;

(d) in all other cases, the appointed person receives written notice of the appointment as required by section 96.

When vacated
98 The position of enforcer of a non-charitable purpose trust is vacated when the enforcer dies, resigns or is removed by a court.

Resignation by enforcer
99(1) An enforcer of a non-charitable purpose trust may resign from that position by giving a written resignation to the trustee of the trust.

Effective date
99(2) The resignation is effective on the date specified in it or the date it is received by the trustee, whichever is later.

Removal of enforcer
100 A court may order the removal of an enforcer of a non-charitable purpose trust from that position where the enforcer can not act in that capacity or contravenes section 95.

Application for order
101(1) An application for an order under clause 93(2)(c) or section 100 may be brought by

(a) the trustee of the trust;

(b) a settlor or a delegate of the trust, if living;

(c) a person who has a residuary interest in the trust;

(d) a person who derives a direct or tangible benefit from the trust; or

(e) such other person as a court may allow.

Notice
101(2) A person who applies for an order under clause 93(2)(c) shall give notice of the application to

(a) the trustee of the trust;

(b) the settlor or the delegate of the trust, if living;

(c) any person who has a residuary interest in the trust; and

(d) such other person as a court may direct.

Notice also to enforcer
101(3) A person who applies for an order under section 100 shall give notice of the application as provided in subsection (2) and to the enforcer of the trust.

Statute prevails over instrument
102 Sections 92 to 101 govern every non-charitable purpose trust notwithstanding any contrary intention expressed in the instrument, if any, creating the trust.

CERTAINTY OF NON-CHARITABLE PURPOSE TRUSTS

Court may provide certain method
103(1) Where a non-charitable purpose trust has a purpose that is certain and the trust

(a) does not state a method to achieve that purpose, a court may order the use of the method that, in its opinion, fulfils the intention of the creator of the trust;

(b) states an unclear method to achieve that purpose, a court may order any clarification of the method that, in its opinion, fulfils the intention of the creator of the trust; or

(c) states a method to achieve that purpose and that method is or becomes impossible, impracticable or obsolete, a court may revoke that method and order the use of another method to achieve that purpose.

Method need not be similar
103(2) A court acting under clause (1)(c) is not obliged to substitute a method that is similar to the original method.

Limitation
103(3) A court may not make an order under this section without the consent of any settlor of the trust, if living.

Coming into force
9 This Act comes into force on the day it receives royal assent.

REPORT ON NON-CHARITABLE PURPOSE TRUSTS

EXECUTIVE SUMMARY

EXECUTIVE SUMMARY

The Manitoba Law Reform Commission's Report on *Non-charitable Purpose Trusts* proposes a set of statutory mechanisms designed to overcome the technical barriers that have traditionally prevented the validity of non-charitable purpose trusts.

RATIONALE FOR REFORM

A non-charitable purpose trust is a trust established for the benefit of a stated objective or purpose rather than for the benefit of a person; moreover, its objective or purpose is not recognized by the law as "charitable" in nature. The law's definition of "charity" is very specific and somewhat archaic; it has not kept pace with the concept of charity as popularly understood in our modern society. A benevolent purpose that would be characterized as charitable by society can often be labelled non-charitable by the law.

For example, most environmental purposes would likely be classified as non-charitable by the law. Remedying the technical invalidity of non-charitable purpose trusts could increase the ability to take advantage of creative responses to environmental problems, like "Trusteed Environmental Funds". An industry could establish one of these investment funds to generate sufficient money over time to pay the total cost of any ultimate environmental clean-up necessitated by the industry's operations.

The Commission advocates reform in this area precisely because "non-charitable" purposes are often designed to aid or benefit modern society or some segment of it. As well, the continued technical invalidity of such trusts is an unreasonable limit on people's freedom to dispose of their property.

THE ENFORCEMENT MECHANISM

Courts usually find non-charitable purpose trusts to be invalid because they are unenforceable. A trust established for the benefit of a purpose (not of a person) has no beneficiary motivated by self-interest to enforce the trust by making sure the trustee is properly carrying out its terms. Nor in this situation will courts place an enforcement obligation on the Crown, as courts do with charitable purpose trusts in order to make them enforceable.

The Commission recommends that a position of enforcer be statutorily created for non-charitable purpose trusts. This enforcer would (just like a beneficiary) have both the right and the obligation to enforce the non-charitable purpose trust and could, for example, compel the trustee to carry out the trust purpose, restrain the trustee from maladministration, and ensure the timely exercise of the trustee's discretion.

The enforcer would be appointed by the creator of the trust or by the creator's delegate. To prevent a conflict of interest, the same person could not be appointed both as trustee and as enforcer.

The trust would not fail if there is a vacancy from time to time in the enforcer position; the trustee would be obliged to seek the appointment of a new enforcer named by the creator, a delegate or the court. A court application to name a new enforcer could also be initiated by the trust's creator, a person who has a residuary interest in the trust, a person who derives a direct or tangible benefit from the trust, or by such other person as a court may allow.

While an enforcer is always free to resign, an enforcer could be removed from that position only by court order. Removal of an enforcer who cannot act or who is not fulfilling the position's duties could be sought by the trust's trustee or by any of the people entitled to bring a court application for a new enforcer.

THE CERTAINTY MECHANISM

The second traditional stumbling block to validity for non-charitable purpose trusts is that courts have not developed "saving mechanisms" to cure any defects of uncertainty concerning how to carry out the clearly expressed purpose of such a trust. Saving mechanisms have been developed by the courts only for charitable purpose trusts.

The Commission recommends that, where the purpose of a non-charitable purpose trust is clear but the method of carrying it out is unclear, a court should be able to use the same "scheme-making" approach as for charitable purpose trusts and supply the missing method in whole or in part, as the case may require.

The creation of a saving mechanism is more difficult where the purpose of a non-charitable purpose trust is clear but the stated method of carrying it out, while clear, is or becomes impossible, impracticable or obsolete. For charitable purpose trusts in this situation, courts use the *cy-près* doctrine to find the general charitable intent of the trust and to substitute a new method in accordance with it. This approach can work because there is a legal definition of "charity" that creates known boundaries to limit the court's speculation about possible charitable intentions. Since the boundaries of "non-charitable purposes" are limitless, a new remedy is required for non-charitable purpose trusts.

The Commission proposes that a court should construct its frame of reference in each individual case by examining the trust creator's intention in creating the non-charitable purpose trust and by then determining whether a wider, more general non-charitable purpose is perceivable. If it is, the court should be allowed to vary the method of the trust only within the ambit of that perceivable non-charitable purpose.

A court would never be able to save a non-charitable purpose trust that has an unclear purpose because it follows that the creator's intention would also be unclear and could not serve as a limiting framework to the endless resulting possibilities of meaning.

MULTI-PURPOSE TRUSTS

Some trusts will contain multiple charitable or non-charitable purposes or a mixture of both charitable and non-charitable purposes. Should any one of these purposes prove to be invalid, the Commission recommends that it be severed and the trust applied for the benefit of the remaining valid purposes. Also, if a trust does not specify how the property is to be divided among multiple valid purposes, the trustee should have the discretion to divide it.

Where a trust embodies in a single word or phrase both charitable and non-charitable purposes, the Commission recommends that the trust be deemed to be solely charitable in nature since its non-charitable application would be impossible to define.